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DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS.

VOLUME XXIV.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE FIRST DISTRICT IN NOVEMBER AND DECEMBER, 1887; IN THE FOURTH DISTRICT IN SEPTEMBER AND OCTOBER, 1887; IN THE SECOND DISTRICT IN DECEMBER, 1887; AND IN THE THIRD DISTRICT IN AUGUST AND NOVEMBER, 1886, AND JANUARY AND FEBRUARY, 1887.

REPORTED BY
EDWIN BURRITT SMITH,
OF THE CHICAGO BAR.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1887.

JAMES J. McGRATH
V.
THE CITY OF CHICAGO.

Municipal Corporations—Taxes—Act of April 15, 1873—Ordinance Under, Void—Chicago Tax Commissioner—Claim for Salary—General Incorporation Law—Re-organization under.

1. The re-organization of a city under the general incorporation law abrogates its former charter and determines the tenure of all officers under it, except such as are within the saving clause of the general law.

2. The Act of April 15, 1873, in regard to the levy and collection of taxes by incorporated cities, having been declared unconstitutional, the ordinance of the City of Chicago under which a tax commissioner was appointed, and under which he claims to have performed the duties of such office and to be entitled to the salary thereof, was void and incapable of conferring any rights upon him.

[Opinion filed November 9, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

This was a suit in assumpsit, brought by James J. McGrath against the City of Chicago, to recover the salary which the

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plaintiff claims is due him as city tax commissioner, for five months, from August 1, 1876, to December 31, 1876. The cause was tried before the court, a jury being waived, and such trial resulted in a finding and judgment for the defendant. The facts shown by the evidence are these :

On the 15th day of June, 1874, the Common Council of the City of Chicago passed an ordinance for the election of a city tax commissioner, and defining and prescribing his duties; the first section of said ordinance being as follows:

“Section 1. At the first regular meeting of the Council after the passage of this ordinance, there shall be elected, by the Common Council, a city tax commissioner in and for said city. The commissioner so elected shall hold his office until the second Monday in December, A. D. 1875, or until his successor shall be elected and qualified. On said second Monday in December, and every two years thereafter, there shall be elected by the Common Council a tax commissioner in and for said city. All tax commissioners elected under this ordinance shall hold their office for the term for which elected, and until their successors are elected and qualified. The salary of said tax commissioner shall be fixed in the annual appropriation ordinance or by some ordinance passed during the first quarter of the fiscal year of said city: Provided, however, that nothing contained in this ordinance shall be considered binding on the Common Council in case they should determine to collect the city taxes of any one year under the provisions of the general revenue law of this State.”

The second section of the ordinance required the tax commissioner to give an official bond, and the remaining sections prescribed his official duties.

On the 22d day of June, 1874, said Common Council proceeded to the election of a city tax commissioner, and the plaintiff having received a majority of all the votes cast, was declared duly elected, and he thereupon qualified and entered upon the duties of his office. At the same meeting of the Council an ordinance was passed making various appropriations for the fiscal year, commencing April 1, 1874, and ending March 31, 1875, and among these was an appropriation “for

one tax commissioner, \$4,000;" and it was provided that the amounts appropriated for the payment of salaries to the respective officers and employes, in said ordinance mentioned, should be paid monthly at the rate per annum of the amounts respectively appropriated, until otherwise lawfully provided.

In pursuance of an election held in the City of Chicago on the 23d day of April, 1875, said city became organized under the General Incorporation Law, and on the 3d day of May, 1875, the said Council passed the following ordinance:

"Whereas, a majority of the votes cast at the election held in the City of Chicago on the 23d day of April, A. D. 1875, were and are for city organization under general law, and by reason of such election the said City of Chicago has become and is organized under such general law, to-wit, an act entitled 'An act to provide for the incorporation of cities and villages,' in force July 1, 1872; and,

"Whereas, doubts may exist, in the absence of an ordinance on the subject, as to the powers and duties and the continuance in office of municipal officers, boards, member of municipal boards and employes of the City of Chicago, who were such at the time of the organization of said city under such general law; and,

"Whereas, it is necessary to the public interest and service and the administration of the municipal government that such doubts should not exist; therefore,

"Be it ordained by the City Council of the City of Chicago:

"Section 1. That all city officers, city boards, members of city boards and employes of the City of Chicago, who were such at the time of the organization of the City of Chicago under an act entitled 'An act to provide for the incorporation of cities and villages,' in force July 1, 1872, shall be and remain such officers, boards, members of boards and employes, until their successors shall be elected or appointed and qualified, and shall have and exercise the same powers and perform the same duties as heretofore and before said organization under the said act, until otherwise provided by law or ordinance.

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"Section 2. This ordinance shall take effect and be in force from and after its passage."

On the 9th day of August, 1875, said city passed an ordinance fixing the total amount of all the appropriations for the current fiscal year, and certifying the same to the County Clerk of Cook County. On the 28th day of April, 1876, an ordinance was passed making appropriations for the fiscal year, and among them was an appropriation for the expenses of the tax commissioner's office, including salaries, clerk hire, etc., and it was therein provided that the salaries should be paid at the same rate as during the preceding year. On the 12th day of July, 1876, said Council passed the following resolution:

"Whereas, the Supreme Court has decided the act known as "Bill 300" to be unconstitutional, and even if that decision should be modified or reversed, it is not desirable to attempt the levy and collection of taxes otherwise than by the general law applicable to the entire State; and,

"Whereas, the office of tax commissioner and city assessor, though useless, can not be abolished to take effect before January next, therefore,

"Resolved, That the Mayor be and he is hereby respectfully requested and urged to cause the discharge of the assistants and employes of each of those offices, and to remove the incumbents of the offices themselves, in order that the offices remain vacant until they can be lawfully abolished; the books in possession of the officers to be transferred to the board of public works."

In accordance with the foregoing resolution the Mayor, on the 5th day of August, 1876, transmitted to the plaintiff the following communication:

"CHICAGO, Aug. 5, 1876.

"J. J. McGRATH, Esq., City.

"*Dear Sir:*—In accordance with the resolution passed by the honorable City Council, July 17, 1876, requiring that the books and other public documents in your possession be turned over to the board of public works upon your vacating the office of tax commissioner, I hereby notify you to comply with the provisions of said resolution and to hand over to said board

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of public works such public documents and to take a receipt for the same. I shall feel obliged by your complying with this request at once.

“Respectfully,
“M. HEATH, Mayor.”

On the 26th day of July, 1876, the City Council passed an ordinance, the eighth section of which is as follows:

“Section 8. The offices of city tax assessor and city tax commissioner be and the same are hereby abolished, the same to take effect on the thirty-first day of December, 1876.”

There seems to have been no election of tax commissioner subsequent to the election of the plaintiff, June 22, 1874, and the plaintiff claims to have held over in default of an election of his successor. The evidence shows that he refused to turn over the books and documents in his hands in accordance with the foregoing request of the Mayor, but continued to hold them and to attempt to discharge the duties of his office down to December 26, 1876, at which date he delivered the key of the vault containing said books and documents to the city comptroller. It is admitted that the plaintiff's salary was paid down to August 1, 1876, but that nothing was paid him subsequent to that date.

Messrs. H. T. & L. HELM, for appellant.

Mr. CLARENCE A. KNIGHT, for appellee.

BAILEY, J. The act of the General Assembly, entitled “An act in regard to the assessment of property and the levy and collection of taxes by incorporated cities in this State,” approved April 15, 1873, and known as “the City Tax Act,” provided a mode for the assessment and collection of taxes different from that prescribed by the general revenue laws of the State, and authorized the election or appointment of certain officers to carry out the revenue system thus inaugurated. The last section of the act empowered the City Council, in its discretion, to provide by ordinance for the appointment of a city tax commissioner, to fix the term of his office and the amount of

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his salary, and to confer upon him such powers, and to require of him the performance of such duties as such Council might deem necessary and proper.

In pursuance of the powers thus granted, the City Council of the City of Chicago, on the 15th day of June, 1874, passed an ordinance providing for the election by said Council of a city tax commissioner, fixing his term of office, prescribing his powers and duties, and making it the duty of said Council, from time to time, to fix the amount of his salary. Manifestly the office of tax commissioner thus created was a part of the machinery for carrying out the revenue system created by the act, and that the validity of the office depended upon the validity of the system of which it formed a part.

In *People v. Cooper*, 83 Ill. 585, said act was declared to be unconstitutional and void, and it follows, unavoidably, as it seems to us, that the ordinance under which the plaintiff was elected to the office of city tax commissioner, and under which he claims to have performed the duties and to be entitled to the salary of such office, was void and incapable of conferring any rights upon him.

It is urged, however, that the plaintiff's election as city tax commissioner may be sustained under the provisions of section 1, chapter 10, of the former charter of the City of Chicago. Tuley's Laws and Ordinances, 476. It is sufficient answer to say, that the City Council, in creating the office, fixing its term and duties, and filling it by the election of the plaintiff, did not assume to act, and did not in fact act, under that section of the charter. By that section it is provided that an officer termed "a commissioner of taxes" should be appointed by the Mayor with the advice and consent of the Council, to hold his office for the term of four years, and to perform the duties imposed upon such officer by said charter. It is clear that the office, though similar in name, was not the same office created by the ordinance of June 22, 1874, and that the plaintiff's election can derive no validity from the provisions of the old charter.

But there is another ground upon which it must be held that the plaintiff was not entitled to hold said office and

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receive its emoluments during the period for which he is now seeking to recover the salary pertaining to the office. The creation of said office and the plaintiff's election to it, were anterior to the organization of the City of Chicago under the general incorporation law, and by force of said organization, said office was abolished. In *People v. Brown*, 83 Ill. 95, and *Crook v. People*, 106 Ill. 237, it was held that the reorganization of a city under the general incorporation law was an abrogation of its former charter, and determined the tenure of all officers under it, except such as were within the saving clause of the general law. The saving clause provided that the officers in office at the time of the organization under the general law, "shall continue to exercise the powers conferred upon like officers in this act until their successors shall be elected and qualified." It is held in the cases above cited, that this proviso must be understood to apply to the officers provided for in the general incorporation law, answering to the same officers under special charters. There is no provision in the general incorporation law for the election or appointment of a city tax commissioner, nor is any officer provided for having powers or duties answering to that of city tax commissioner created by the ordinance in question in this case.

This cause was tried before the court without a jury, and no questions of law were raised at the trial. The only contention now is, that the finding and judgment are contrary to the evidence. We are of the opinion that said finding and judgment may be sustained upon either of the theories above noticed, and the judgment will, accordingly, be affirmed.

Judgment affirmed.

Johnson v. City of Chicago.

EMIL JOHNSON, BY NEXT FRIEND,
V.
CITY OF CHICAGO.

Municipal Corporations—Personal Injury—Instructions.

1. Where the plaintiff fails to make out a cause of action, error in the instructions affords no ground for reversal.
2. In an action against a municipal corporation to recover for a personal injury, this court holds that the evidence fails to show a cause of action.

[Opinion filed November 9, 1887.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. G. G. BELLWS, for plaintiff in error.

Messrs. H. WASHBURN and CLARENCE A. KNIGHT, for defendant in error.

McALLISTER, J. This was an action brought August 4, 1883, by plaintiff in error by his next friend, against the City of Chicago, to recover for a personal injury to the former, received July 15, 1883, by having his foot caught between the south end of the swing bridge on Clark Street, and the north end of the south approach thereto, while said bridge, which had been opened to let a vessel pass, was being closed. The declaration, after setting out the duty of the city in the premises, states the cause of action in these words: "Yet the defendant, not regarding its duty in that behalf while it was so possessed and had the control of said bridge and said approaches to said bridge, to-wit, etc., then wrongfully and negligently suffered the same to be and remain in bad and unsafe repair and condition, and said approaches defective and bad and without proper guards, nor was there any or sufficient light at the approach to said bridge, by means whereof the

said Emil Johnson, who was then and there passing along and upon said bridge and said approaches, then and there necessarily and unavoidably was caught by his foot between said bridge and said approaches," etc.

There was a trial under the plea of general issue, verdict for defendant on which judgment passed, and plaintiff brings error to this court.

Upon full and careful consideration of the case we are of opinion that the evidence fails to show a cause of action set out in the declaration. There was no attempt on the trial to prove any defect either in the bridge or approach thereto. There was some testimony tending to show that it was dusky, or getting dark, and that the gas lamps located at the south end of the bridge had not been lighted at the time of the accident; but under the facts that could not constitute a sufficient basis for a recovery, if true. The time was July 15th, when the darkness comes late. The weather was fair and sky clear. It was Sunday evening. The plaintiff, then a boy about seven years of age, whose home was with his parents, living in North Chicago, came in company with and in charge of a Miss Nowackson, an adult member of his father's family, over into the South Side for the purpose of a walk. Starting to go home they reached the place of Clark Street bridge about half past eight o'clock, and, on the west side of the street, walked up to within a few steps of what would be the south end of the bridge, if in place. The bridge, however, had, but little previously, been swung open to let a vessel pass, but was then being turned back in its usual manner to its proper place; and the evidence shows that both Miss Nowackson and plaintiff were aware of the situation of the bridge as respected its having been opened and then being in the process of closing. But it happened that there was at this time an excursion boat lying in the river, just east of the bridge, on which a band of music was playing. That naturally drew quite a collection of persons upon said approach to the bridge, and especially the east side of it. The plaintiff became attracted by the music and his curiosity was excited to see just where it came from. So he urged his attendant to

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change positions from the west over to the east side of the street there. They went, taking a position only two or three steps from the end of the approach, or the south end of the bridge, when it should be returned to its proper place. Then the plaintiff found he could not see the boat where the band was, on account of the number of people standing on the east side of said approach. So he began to urge his attendant to go upon the bridge which was not then fully closed. She, knowing the bridge was not fully closed, refused, giving that as a reason, and telling him not to go upon the bridge until it was closed. Thereupon he suddenly pulled his hand out of that of his attendant, sprang toward the bridge before it was fully closed, got his foot caught, whereby it was so crushed as to require amputation. The case is like that of *Gavin v. City of Chicago*, 97 Ill. 66, and should be governed by it.

We perceive no error in the exclusion of evidence offered on behalf of plaintiff or in admitting any on the part of defendant. One instruction for defendant may be obnoxious to criticism, but the law is well settled in this State, that if the plaintiff fails to make out a cause of action, error in the instructions affords no ground for reversal. The judgment below should be affirmed.

Affirmed.

CHICAGO CITY RAILWAY COMPANY

V.

MAY C. DUFFIN.

Personal Injuries—Action for Damages against Street Railway Company—Bill of Exceptions, a Pleading—Action and Rulings of Court—Presumption—Affidavit for Continuance—Improper Remarks of Counsel—Waiver of Objections.

1. The bill of exceptions is considered a pleading of the party alleging the exception; and, when liable to the charge of ambiguity, uncertainty or omission, it is construed most strongly against the party who prepared it.

24	28
41	247
24	28
44	77
44	130
44	178
24	28
52	497

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2. The correctness of the action or rulings of the trial court will always be presumed in the absence of anything in the bill of exceptions, or record proper, showing the contrary.

3. In an action against a street railway company to recover damages for a personal injury, it is *held*: That the evidence sustains the verdict for the plaintiff; that the appellant can not, under the bill of exceptions, predicate error upon the ruling of the court in respect to an affidavit for a continuance; and that objection to certain improper remarks of counsel was waived by the failure of defendant's counsel to preserve an exception.

[Opinion filed June 22, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. HYNES, ENGLISH & DUNNE, for appellant.

Messrs. STILES & LEWIS, for appellee.

McALLISTER, P. J. This was an action on the case by appellee against the appellant corporation to recover damages for a personal injury received by the former in February, 1884, at the corner of 18th Street and Michigan Avenue in the City of Chicago, by reason, as it was alleged, of the carelessness of the conductor upon one of appellant's horse cars, in giving the bell signal to start such car while appellee was in the act of getting upon the same for the purpose of being carried as a passenger, whereby the car being suddenly started in response to said signal, she was violently thrown down, her face striking against some portion of said car as she went, producing in that, and by the manner of her fall upon the ground, a serious bodily injury. There was a trial by jury under the plea of not guilty, resulting in a verdict for appellee and assessing her damages at \$2,500; upon which the court, overruling defendant's motion for a new trial, gave judgment and the latter prosecutes this appeal.

The evidence on behalf of the plaintiff tended to prove her cause of action and the extent of her injury as alleged in her declaration. The defendant introduced evidence tending to disprove the facts in plaintiff's case, as to the cause of the

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injury, and tended to prove that, instead of the car having come to a stop for the purpose of letting the plaintiff get on and then suddenly starting, while she was in the act of doing so, she attempted to get on before the car had stopped, and some way missing her footing, fell to the ground.

The point is made on this appeal, that upon the questions of negligence on the part of defendant and the exercise of ordinary care by plaintiff, the evidence so clearly preponderates in favor of the defendant that the trial court erred in overruling its motion for a new trial, and this court should, for that reason, reverse that judgment.

We have carefully read the evidence and think that it does not present a case for the interference by this court, with the verdict of the jury, on the ground that it was against the clear weight and preponderance of the evidence, within the established rules of the Supreme Court in that behalf. There were circumstances developed upon the trial strongly tending to support the theory of the plaintiff, which we can not stop to discuss, but notably the absence of the testimony of the conductor of the car, at the time, without any satisfactory explanation or excuse.

There is no complaint on the part of the appellant as to giving or refusing instructions by the court to the jury. There is an assignment of error upon the admission of improper evidence; but upon examination of the record, we think there is not enough in the points made in that respect to justify statements and discussion of them. Two principal points seem to be relied upon by appellant's counsel and which they have discussed with force and ability. As stated by counsel they are: *First*, that at the beginning of the trial a motion was made, based upon the affidavit of an authorized agent of defendant, for a continuance on account of the absence from the State of two witnesses, the affidavit setting out the facts which it was expected to prove by them respectively; that the court held the affidavit sufficient to authorize a continuance, and that thereupon plaintiff's counsel, to avoid such continuance, agreed and consented to admit the affidavit in evidence; that upon the trial the defendant's counsel read in evidence the portions of said

affidavit which set out the facts expected to be testified to by said witnesses, to the jury; that thereupon the court permitted the plaintiff's counsel, against the objections of the defendant, to read in evidence to the jury all the residue of said affidavit, which appellant's counsel insists was incompetent.

Secondly, that plaintiff's counsel made improper remarks and statements to or in the hearing of the jury, calculated to create undue prejudice in them against defendant.

It is insisted by counsel for appellee, that the question involved in the first of the above points and as respects the reading of said affidavit in evidence is not presented, and that no proper exception is preserved by the appellant's bill of exceptions.

It has been the settled rule of the Supreme Court of this State since the year 1841, that a bill of exceptions is not to be considered as a writing of the Judge who signs and seals, but that it is to be esteemed as a pleading of the party alleging the exception; and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it. *Rogers v. Hall*, 3 Scam. 5; *McLaughlin v. Walsh*, 3 Scam. 185. In *McKee v. Ingalls*, 4 Scam. 30, the rule was thus stated: "It is the duty of the party excepting to set forth in his bill of exceptions the whole matter necessary to make the very truth of that matter appear; and the omission shall be taken most strongly against him."

It is an established rule of the Supreme and Appellate Courts that, upon appeals and writs of error, the correctness of the action or rulings of the trial court will always be presumed in the absence of anything in the bill of exceptions, or record proper, showing to the contrary.

Now in this case the bill of exceptions fails to show, by any proper statements, that defendant made any motion for a continuance on account of the absence of necessary and material witnesses, and to identify any affidavit as the basis of such motion. It contains no statements as to how or in what way a motion for continuance was disposed of—whether under the statute or by agreement of counsel—nor does it show with any

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reasonable certainty that the defendant preserved an exception to the ruling of the court in permitting the plaintiff's counsel to read in evidence the entire affidavit, of which the defendant's counsel had previously read portions.

All that appears by the bill of exceptions, pertinent to the matter under consideration, is that it states certain conversation between the counsel and presiding Judge, concerning the affidavit, which is not identified as being, or having been, the basis of a motion for a continuance, and counsel for defendant said he would now read the affidavit in evidence, and the bill of exceptions says: "Mr. Hynes reads certain portions of the affidavit of Sumner C. Welch. Mr. Stiles then reads the affidavit entire. Mr. Hynes: I object to the reading of those portions of the affidavit. My point is this, that only so much of the affidavit is admissible as states what is expected to be proved by the absent witnesses. The court: I think he is entitled to read it all."

Then, without any words connecting it with anything in the case, follows a copy of an affidavit purporting to have been made by Sumner C. Welch, after which follow these words: "Exception by defendant."

We are of opinion that, taking this bill of exceptions subject to the rule of construction as above stated, the appellant can not be permitted to predicate error upon the ruling of the court in respect to said affidavit.

The other ground of error arises upon alleged improper remarks made by the counsel for plaintiff to, or in the hearing of the jury. The first of such remarks, as appears by the bill of exceptions, arose while a colloquy was going on between counsel, as respected a former conversation between them. The counsel for defendant said: "I will admit that the gentleman said everything that he possibly could against the company. Mr. Stiles: No, I could have stated that you have killed twenty or thirty on your own line of road. The defendant excepted to the above statement."

There was no repetition of the remark, and we feel justified in saying, without discussion of the point, that it is an insufficient cause for reversal of the judgment.

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The other remarks of counsel objected to here were made in his closing speech to the jury, which is incorporated into the bill of exceptions. They are too voluminous to be set out in an opinion. They were very improper, and the counsel would probably have been checked if the court's attention had been called to them by the defendant's counsel. But the latter failed to so object. No exception is preserved, and we think the error was waived by the defendant's counsel not objecting. *Earl v. The People*, 99 Ill. 123.

Perceiving no substantial error in the record, the judgment below will be affirmed.

Affirmed.

RE-HEARING.

Per Curiam. A re-hearing having been granted in this case upon petition of the appellant, we have reconsidered the case upon all the grounds presented in such petition, and have come to the conclusion that the judgment should be affirmed for the reasons given in our opinion.

Judgment affirmed.

FAIRBANK CANNING COMPANY

V.

ELIZABETH C. INNES.

Action against Employer for Damages for Causing Death of Plaintiff's Husband—Agreement—Reasonable Care—Approved Appliances—Defective Elevator—Negligence—Question for Jury—Practice—Declaration—Instructions.

1. In an action to recover damages for causing the death of the plaintiff's husband, who was killed by reason of the defective construction of an elevator which he was employed to operate, it is *held*: That a certain conversation with the deceased can not be construed as an agreement on his part to take the risk of defects in the construction of the elevator, or to relieve the defendant from the duty of using reasonable care to provide such appliances for safety as were known and in general use; that it was for the

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jury to draw from the evidence the inference of care or of negligence; that the declaration was sufficient after verdict; and that objection to it should have been taken by demurrer before trial.

2. Upon a rehearing it is further *held*: That in the absence of proof of any other intervening cause, the giving way of the timbers and supports was of itself sufficient evidence to justify a verdict that their construction was negligent; that it was the duty of the defendant to use reasonable care and diligence in supplying, for the use of its employes, machinery which should be reasonably safe and secure; that it was for the jury to determine whether an elevator constructed without a brake was reasonably safe; that the evidence does not show a contract on the part of the deceased to assume any risks beyond those which might result from his own want of care; that there is no evidence tending to charge him with negligence; and that there was no substantial error in giving and refusing instructions.

[Opinion filed April 26, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. JOHN C. RICHBERG, for appellant.

“Where defects in machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risks resulting from its use, unless the master, by urging upon the servant or coercing him into danger, or in some other way, directly contributes to the injury.” C., B. & Q. R. R. Co. v. Smith, 18 Ill. App. 124.

In this case there was no urging or coercing; on the contrary, the deceased was warned that he took it at his own risk, as it was; he knew just as well as the master that there was no air-brake on this elevator; as an experienced elevator man, who had made two trial trips, he could not help but know it; and if the steam-brake was taken off on the night of February 2d, he was bound to know when he took charge of the elevator on the 3d, that it was not on, and certainly before the accident occurred, as he had made numerous trips on the morning of the accident. C., R. I. & P. R’y Co. v. Lonergan 118 Ill. 41; Payne v. Reese, 100 Pa. 306; C. & N. W. R’y Co. v. Snyder, 117 Ill. 376; C., M. & St. P. R’y Co. v. Stondart, 16 Ill. App. 145; Stafford v. C., B. & Q. R. R. Co., 114 Ill. 244; C. & E. I. R. R. Co. v. Geary, 110 Ill. 383, 389.

Fairbank Canning Co. v. Innes.

Mr. JOHN B. SKINNER, for appellee.

Per Curiam. Appellant brings this appeal from a judgment of the Superior Court for \$5,000, recovered by appellee for causing the death of George Innes, the husband of appellee.

It appears from the record that the deceased was employed by the superintendent of appellant to run the elevator, that he was an experienced elevator man, had run elevators for many years and was careful and competent. Within a short time after he commenced to run the elevator on the first trip he made, either the beams overhead and which bore the weight of the elevator, or the wheel over which the cable ran, broke, and the elevator was precipitated to the bottom of the shaft and Innes was killed. There is nothing to show that the falling of the elevator was due to any carelessness on the part of deceased, and from his experience and character for prudence the jury might infer the exercise by him of proper care in managing the elevator. It is in proof that there was no air-brake on the elevator and that if a proper air-brake had been upon it, the fall of the elevator would have been prevented. It further appears that a steam-brake, which was on the elevator, was removed, and it does not appear that the attention of Innes was called to the fact that there was no air or steam-brake upon it when he was placed in charge of it. So far as external appearance went, the elevator appeared to be in good condition. The superintendent told Innes when he went upon the elevator that he must look out and run at his own risk, and Innes told him not to be afraid, that he had run an elevator for twenty years. Appellant presses this with a view of showing that Innes took the risk of all danger, but we think it plain that the conversation had reference to his care and his competency and that it can not be understood as an agreement on his part that he took the risk of defects in the construction or machinery of the elevator which were unknown to him, or that it can be construed to relieve the appellee from the duty of using reasonable care to provide upon the elevator such appliances for safety as were known and in general use. The

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jury is the proper tribunal to draw from the evidence the inference of care and of negligence in such cases, and when there is evidence before them which authorizes such inferences the court can not interfere.

No point is made against the instructions of the court, but counsel contends that the declaration is insufficient, and that this motion in arrest of judgment ought to have been sustained; we think the declaration sufficient after verdict. The objection to it should have been taken by demurrer before trial. *C., B. & Q. R. R. Co. v. Harwood*, 90 Ill. 425; *L. S. & M. S. R'y Co. v. O'Connor*, 115 Ill. 254.

On the whole record, we think the judgment of the Superior Court must be affirmed.

Judgment affirmed.

RE-HEARING.

BAILEY, J. This was an action on the case brought by Elizabeth C. Innes, administratrix of the estate of George Innes, deceased, against the Fairbank Canning Company, to recover damages resulting from the death of the plaintiff's intestate. The declaration alleges that the defendant, in the lifetime of said Innes, built, constructed and placed in its packing-house a certain elevator for carrying freight between the different floors of said building and placed said Innes in charge of it; that said elevator was built, constructed and placed by the defendant in so careless, negligent and wrongful a manner, that while said Innes was, with all due care and diligence, in said elevator and running the same, said elevator or portions of it, without any fault on his part, was and became broken and displaced and gave way, thereby precipitating said elevator from the upper floor of said building to the basement and causing the death of said Innes. At the trial the jury found the defendant guilty and assessed the plaintiff's damages at \$5,000, and for that sum and costs the plaintiff had judgment.

The ground upon which the defendant chiefly relies for a reversal of the judgment is, that the verdict is unsupported by the evidence. It appears that in the latter part of January,

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1885, the defendant employed the Ellithorpe Air Brake Company to re-construct its freight elevator, using, in so doing, the cage belonging to the former elevator. On the 2d day of February, 1885, said elevator was turned over to the defendant as ready for use, and on that day the defendant employed Innes to take charge of and run it. At 7 o'clock the following morning Innes was put in charge of the elevator, and commenced operating it, carrying freight between the different floors of the building. After he had been running it about an hour, the cage fell from the top to the bottom of the elevator shaft, causing the death of Innes almost instantly. After the cage had fallen, it was found that all the timbers at the top of the shaft upon which the cage was suspended, had come down, three of them having lodged part way up the shaft and the residue being at the bottom; that the wheel over which the cable ran was broken, the fragments lying in the cage, and that the cable itself was broken. The cage had previously been supplied with a steam-brake, but said brake had been removed from it the evening before Innes took charge of the elevator, and it does not appear that he was informed of its removal or that he was aware of its absence. The evidence also tends to show that if the elevator had been supplied with an air-brake the cage would not have fallen.

It is insisted that the evidence fails to establish negligence on the part of the defendant. As we have seen, the negligence charged was in the construction of the elevator. In the absence of proof of any other intervening cause, the giving way of the timbers and supports upon which the elevator cage was suspended was, of itself, evidence of negligence in the construction of those supports, and justifies a verdict that their construction was negligent.

There is one circumstance, however, testified to by one of the defendant's witnesses which is relied upon as tending to show an intervening cause for the giving way of said timbers. That witness testifies that, after the cage had fallen, he noticed "a casting from the top of the cage stuck on top of the timbers," and it is argued that the cage must have been run up against said timbers so as to throw them out of their places and cause

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them to fall. Such inference might perhaps have been warranted if it had appeared that the timber in which the casting was found imbedded was one of those which had lodged in the shaft and had not fallen to the bottom. This, however, is not shown, and in the absence of specific information from the witness on this point, we are at liberty to assume that it was one of the timbers which was found at the bottom of the shaft lying in or upon the cage. It is much more probable, then, that the casting became imbedded in the timber by the timber's falling upon the cage than by the cage being run up against the timber.

There is also ground for charging the defendant with negligence in having the elevator constructed without a proper and sufficient brake. A steam-brake which is shown to have been a very considerable safe-guard against accident, had been taken off, and an air-brake, an appliance which, as it seems, would have completely protected the cage against any liability to fall, had not been supplied. It was the duty of the defendant to use reasonable care and diligence in supplying, for the use of its employes, machinery which should be reasonably safe and secure, and it was for the jury to determine whether, under all the circumstances, an elevator constructed without any brake was reasonably safe, within this rule.

But it is claimed that Innes expressly undertook to take charge of and run the elevator at his own risk. It appears that Innes was hired by the defendant's engineer and there is no evidence that, at the time he was employed, there was anything said between him and the officer who employed him, in relation to the assumption by him of any of the risks incident to his employment. After he was hired, however, and before he took charge of the elevator, the defendant's superintendent had a conversation with him in the presence of the engineer, in which the superintendent, as he testifies, told Innes that he was to run the elevator at his own risk; that the company would stand no responsibility whatever; that it was a new elevator and they wanted him to take good care of it, and anything that happened to him, he was responsible for himself; that the company would positively not be responsible for any-

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thing; that Innes replied: "You know me long enough; I have been at work in the stock yards for twenty years, and I have run elevators off and on, and you must not be afraid of me;" that the superintendent replied: "If that is the case you go ahead and take care." Taking this evidence all together, it is very clear that it does not show a contract on the part of Innes to assume any risks, or at least, none beyond those which might result from his own want of care.

We are of the opinion that there was no evidence tending to charge Innes with negligence. He is shown to have been competent, experienced and careful in the running and management of elevators, and no act of carelessness or imprudence is shown. We have already considered the theory that he allowed the cage to run up against the beams from which it was suspended, and found that such theory has no substantial basis in the evidence.

We find no material error in the instructions to the jury. No instructions were given at the instance of the plaintiff. A large number were asked on behalf of the defendant, of which a considerable number were given, and we think the law applicable to the case was adequately stated in the instructions given. The propositions of law stated in one or more of the instructions refused are perhaps not open to serious criticism, but said instructions are abstract in form, and it was therefore wholly discretionary with the court to give or refuse them.

After diligently examining the record and giving the arguments of counsel careful consideration, we are unable to find any material error. The judgment will be affirmed.

Judgment affirmed.

City of Chicago v. Wood.

CITY OF CHICAGO

v.

ELLA J. WOOD.

Municipal Corporations—Defective Sidewalk—Personal Injury—Action for Damages—Amended Declaration—Waiver of Objection—Evidence—Physician—License.

1. In an action against a municipal corporation to recover damages for a personal injury caused by a defective sidewalk, it is *held*: That the evidence tended to support the verdict for plaintiff; that the damages allowed were not excessive; that it was proper to allow the plaintiff to file an amended declaration after the evidence was in; that an objection that there was no issue on the amended declaration was waived by the defendant by proceeding with the trial; that the court properly refused to allow certain questions asked the plaintiff on cross-examination; and that the evidence of the physician, who attended the plaintiff, as to the value of his services, was competent.

2. Where the question of license or qualification of a physician arises collaterally in a civil action between third parties, the license or due qualification of the physician under the statute will be presumed.

The case of *City of Chicago v. Honey*, 10 Ill. App. 535, criticised.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. HEMPSTEAD WASHBURN and CLARENCE A. KNIGHT, for appellant.

Messrs. BYAM, PARKHURST & WEINSCHENK, for appellee.

MORAN, P. J. Appellee recovered a judgment against the City of Chicago for an injury sustained by her by stepping into a hole in the sidewalk on State Street, a little south of the intersection of Twelfth Street.

The case was tried before the court and a jury, and a verdict for \$1,750 was found. The evidence tended to support the

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140	499
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24	40
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allegations of plaintiff that she stepped into a hole in the sidewalk, at the place stated in the declaration, and was injured, and that at the time of such injury she was in the exercise of due care, and also tended to show that the defect or hole into which she stepped had been in said sidewalk for such a length of time before the accident that the city authorities, by the exercise of reasonable diligence, might have known of its existence.

We are unable to say that the damages allowed by the jury are excessive. The verdict being supported by the evidence, the judgment must stand, unless some one of the errors of law assigned by the counsel for appellant shall be found to require a reversal. The first point which the counsel urges as error in the brief, is that the court allowed plaintiff to file an amended declaration on the trial in the court below after the evidence was all in, and after plaintiff's counsel had begun his argument to the jury, and that the case proceeded to verdict and judgment without any issue being found on the amended declaration.

There was no error in allowing the amended declaration to be filed. It is within the discretion of the court to allow amendments to the pleadings at any time before final judgment. On the point that there was no issue on the amended declaration, the bill of exceptions recites that the counsel for the city reserved their exception to the ruling of the court, permitting the amendment, "and proceeded with the trial." Having thus proceeded with the trial without objection, both parties treated the cause as at issue, and the city can not now be heard to complain that there was no formal issue on the pleadings.

The next error alleged is that the court refused to allow the two following questions to be put on cross-examination of the plaintiff: "Did you pay the costs of this suit?" "Have you ever sued any other corporation?" The questions were not germane to anything brought out on the direct examination, and were wholly immaterial. Therefore, there was no error in refusing them.

It is next urged that the court erred in allowing Dr. Potter, who attended plaintiff at the time of her injury, to testify

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against objection, that his services were worth \$100, for the reason: 1st, "that there was no evidence to show that said Potter was a licensed physician;" and 2d, "that at the time the evidence was introduced there was no claim made in the declaration for liability incurred, but only for money paid out." The amended declaration obviates the latter ground of objection to the testimony and there remains to consider the objection that there was no evidence that the doctor was a licensed physician.

In support of this objection counsel for the city rely on the case of *City of Chicago v. Honey*, 10 Ill. App. 535.

While that case is undoubtedly sound in the view therein taken of the purpose and intent of the Legislature in enacting the statute to regulate the practice of medicine in this State, we are not inclined to adhere to the rule there laid down as to the burden of proof in cases where the physician sues to recover for services, or where it is sought in a civil case to prove a legal debt incurred for such services. We regard the sounder and better supported doctrine to be as stated by the same learned Justice who wrote the opinion in *City v. Honey*, in the case of *Williams v. People*, 20 Ill. App. 89. It is there said: "After a somewhat thorough examination of the authorities and full consideration, we are of the opinion that the rules, with their proper distinctions, may be thus stated: Where the question of license or qualification of a physician arise collaterally in a civil action between party and party, or between the doctor and the one who employs him, then the license or due qualification under the statute to practice, will be presumed. *McPherson v. Cheadell*, 24 Wend. 15; *Thompson v. Sayre*, 1 Denio, 175; *Pearce v. Whale*, 5 Barn. & C., 38; *Id.* 758.

"But in case of prosecution on behalf of the public the rule is otherwise, and in such cases license or due qualification under the statute is not presumed, and it rests with the defendant to prove it. *Apothecaries Co. v. Bently*, Ry. & Moo. 159; 21 E. C. L. 722; *Sheldon v. Clark*, 1 Johns. 513; *Sherwood v. Mitchell*, 4 Denio, 435; *Smith v. Joyce*, 12 Barb. 21."

The reason why the license will be presumed where there

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is no evidence to the contrary, rests upon the principle that when an act is required, by positive law, to be done, the omission of which would be a misdemeanor, the law presumes that it has been done and therefore the party relying on the omission must make some proof of it though it be a negative. In addition to the cases cited in *Williams v. People*, showing the difference between civil and criminal cases as regards the burden of proof, as to the existence of the license, the following cases will be found to support the distinction as stated in that case: *Brown v. Young*, 2 B. Mon. 26; *Redding v. Commonwealth*, 3 B. Mon. 344; *State v. Crowell*, 25 Me. 171.

We are of opinion, therefore, that the evidence of the doctor, as to what his services to the plaintiff were worth, was competent, and that in the absence of contrary evidence he would be presumed to have been duly licensed, and therefore plaintiff established a legal debt incurred for such services which she was entitled to recover as part of her damages.

We have carefully examined the instructions given and refused, and find the action of the court in that regard free from error. No ground appearing for the reversal of the case, the judgment of the Superior Court must be affirmed.

Judgment affirmed.

J. V. A. WEAVER ET AL.

V.

THE SINGER MANUFACTURING COMPANY.

Landlord and Tenant—Practice—Bill of Exceptions.

In an action to recover rent, it is *held*: That, as the bill of exceptions fails to show that any exception to the finding or judgment for defendant was taken, or motion for a new trial made, neither the sufficiency of the evidence nor an objection to the form of the judgment can be raised in this court.

[Opinion filed November 23, 1887.]

C., M. & St. P. R. R. Co. v. West.

APPEAL from the Circuit Court of Cook County; the Hon. JOHN C. BAGBY, Judge, presiding.

Messrs. JOHN BARTON PAYNE and JOHN V. A. WEAVER, for appellants.

Mr. N. M. JONES, for appellee.

MCALLISTER, J. This was an action originally brought in Justice Court, by appellants against appellee, to recover for rent. On appeal to the Circuit Court, there was a trial by the court without a jury, and a finding and judgment for defendant, from which the plaintiffs took this appeal.

There was evidence upon the trial tending to prove a legal defense viz., a surrender of the term of defendant and acceptance by plaintiffs before the alleged accruing of rent. The sufficiency of that evidence is now challenged by argument. But the bill of exceptions fails to show that any exception to the finding or judgment was taken, or motion for new trial made in the trial court. In such case the point made, as well as that against the form of the judgment, will be unavailing. *Martin v. Foulke*, 114 Ill. 206.

The judgment will be affirmed.

Affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY
V.

WALTER WEST, BY NEXT FRIEND.

Railroads—Personal Injury to Boy—Conflict of Evidence—Rights of Trespasser—Violation by its Servant of Defendant's Rules.

In an action against a railroad company to recover damages for a personal injury to the plaintiff, a boy about seven years of age, caused by an engineer of the defendant ordering the plaintiff to get off his engine while in motion, it is *held*: That the evidence being conflicting the verdict of the jury settles the facts; that, although the engineer violated his instructions in inviting the

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plaintiff upon his engine, and although the plaintiff was a trespasser, he had a right to be exempted from the gross carelessness of the defendant's servant in removing him from the engine; that the violation of the rules of the defendant by its servant does not relieve it from liability for his subsequent wrongful acts while endeavoring to obey and enforce said rules; and that his act can not be regarded as wilful and unauthorized.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. E. WALKER, for appellant.

Mr. SELDEN FISH, for appellee.

MORAN, P. J. The evidence introduced in this case, on the trial in support of the plaintiff's cause of action, tended to show that plaintiff, being at the time about seven years of age, was invited by the engineer to get upon the engine which was used for switching cars upon defendant's tracks; that after riding up and down in the yard several times, and when the engine was moving, the engineer said to plaintiff that the "old man," meaning the yard-master, was coming, and told him to get off; that in obedience to such command plaintiff climbed down the steps of the engine and in attempting to reach the ground his foot was caught under the wheels and crushed. That at the time the engineer told the plaintiff to get off, the engine was moving about as fast as the plaintiff could run, and it was not "slowed up" to enable the plaintiff to get off. The evidence introduced in behalf of defendant was in almost all particulars in conflict with that of plaintiff, and the verdict must be regarded as settling the issues of fact, and as the verdict is supported by the evidence the judgment must stand, unless there was some error of law committed by the trial court, which shall be found to require a reversal of the case.

It is contended by appellant's counsel that the railroad company can not be held liable for an injury occurring in consequence of the act of its employe which was not done in the

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line of his duty, but was in fact in direct violation of the express rules of the company. It is shown that there were plain instructions hanging up in the cab, not to allow any one to ride on the engine except employes, and the rule of the company was shown to be as follows: "No person will be allowed to ride upon the engines except road-masters on their own divisions, conductors or forward brakemen of the train, without permission from the superintendent or master mechanic. Every engineer will be held responsible for the strict enforcement of this rule."

It is apparent that the engineer had no authority to invite the boy upon his engine, and that his doing so was a palpable violation of the rule which the company had laid down for the government of his conduct; but it is also manifest that the boy who got on in obedience to the invitation, could be in no worse position than if he had stolen on without the notice of the engineer, or jumped on as the engine was starting, against the direct order of the engineer that he should keep off. So far as the relation of the company is concerned, the boy, whether he got on at the engineer's invitation, or against his command, was a trespasser, and it may be conceded that if, while riding upon the engine, even by the invitation and permission of the engineer, he had been injured by reason of some negligence in the management or operation of the engine or the road, the company would not be responsible. Being a trespasser, the company would owe him no duty of protection against the ordinary perils of the position which he voluntarily assumed. But when the injury results from the direct act of a servant of the company in endeavoring to enforce the rule of the company, a different question is presented.

The boy had no right to remain on the engine, but he had a right to be exempted from the peril of gross carelessness on the part of defendant's servants in removing him therefrom, and they were bound to exercise toward him, in putting him off, care and prudence, so that in enforcing the rule of the company no injury should be inflicted, which, in view of all the circumstances, reasonable caution on their part could prevent.

It is sought to treat the act of inviting the boy on the engine, allowing him to ride thereon and the ordering him off, as one continuous act of the engineer, all without authority, and hence creating no liability against the company. We can not perceive that the fact that the servant of the company violates its rules, can relieve the company from liability for his wrongful acts, when he afterward undertakes to obey and enforce them. That the rule of the company in evidence authorized the engineer to remove any person wrongfully upon his engine, whether the entry there was in its inception by his invitation or against his will, there can be no doubt. In removing the intruder he was doing the will of the company and his act can not be regarded as wilful and unauthorized. When the act is authorized by the master, he is always liable for the negligent or improper execution of it by the servant.

So it was held that the company was liable where a baggage man forced a boy, who got on the rear platform of a baggage car which was being switched, to jump off while the car was in motion and at a dangerous place, the rule of the company posted up in the car being as follows: "No person will be allowed to ride on this baggage car, except the regular train men employed thereon. Conductors and baggage men must see this order strictly enforced." *Rounds v. D. & L. W. R. R. Co.*, 64 N. Y. 129.

In *Holmes v. Wakefield*, 12 Allen, 580, where the instruction of the company was, "The conductors will not allow any person to ride in any freight car attached to their trains," it was argued that this direction only authorized the conductor to prevent persons getting on the car but did not require him to remove them, especially after the car was in motion. The court said: "We do not think the effect of the instruction can be so limited. It plainly made it his duty to prevent any persons riding on a freight car. This he might do in any lawful and proper manner, by the use of reasonable force to prevent getting upon the car, or removing a person who had got upon the car in violation of the rule. The wrong, to the plaintiff, consisted in using force unreasonably; that is, at a time and under circumstances which made it dangerous to his life or limb."

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It is urged that there is no evidence in the record which shows that the engineer used or even threatened to use any force. The evidence is that he said to the boy, "cheese it, the old man is coming," and told him to get off. Whether what was said and the manner of saying it to this boy of seven years was equivalent to actual force, was for the jury to say. As was said by the court in *Lovett v. S. & S. D. R. R. Co.*, 9 Allen, 557, in answering a similar objection, "His obedience would be naturally expected, without regard to the risk he might incur, and in respect to a child so young, the command would be equivalent to compulsion."

It was, we think, the plain duty of the engineer not to direct the boy to get off the engine till he had stopped it, or at least to have "slowed up" so that the descent from the engine would be rendered reasonably safe. *Kline v. C. P. R. R. Co.*, 37 Cal. 400.

We have examined the instructions given for plaintiff, and find them in substantial accord with the views above expressed and quite as favorable to the defendant as it had a right to ask. We think also that the court was right in declining to give defendant's instructions which were refused. We find no error in the record and the judgment of the Superior Court will therefore be affirmed.

Judgment affirmed.

THE PENNSYLVANIA COMPANY

V.

GEORGE M. SLOAN.

*Statute of Limitations—Misnomer of Defendant—Amendment, not the
Bringing of New Suit—Railroads—Personal Injury.*

1. Where suit is brought against A by the name of B, and he appears and defends, and pending the suit the mistake in the name of the defendant is discovered and corrected by inserting in the record his proper name, such amendment does not constitute the bringing of a new suit against A. This rule applies where the defendant is a corporation.

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2. In an action to recover damages for a personal injury, brought against the "Pittsburg, Ft. Wayne & Chicago Railroad Company," instead of the "Pennsylvania Company," by the negligence of whose servants the plaintiff was injured, it is *held*: That the Pennsylvania Company was the real defendant in the original summons; that the evidence was sufficient to warrant the jury in finding that the plaintiff, in suing out the original summons, intended to bring suit and in fact brought suit against said Pennsylvania Company; that the amendment of the record by inserting the proper name of the defendant was not the commencement of a new suit; and that the action is not, therefore, barred by the Statute of Limitations.

[Opinion filed November 23, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. GEORGE DRIGGS, for appellant.

Mr. JOHN LYLE KING, for appellee.

BAILEY, J. This was an action on the case to recover damages for a personal injury. The injury complained of was received by the plaintiff July 5, 1872, and it appears without controversy, so far as this appeal is concerned, that said injury was caused by the negligence of the defendant's servants in the management and operation of certain engines and cars upon a railway in the possession of and operated by the defendant. The only defense insisted upon here is that which is presented by the defendant's plea of the Statute of Limitations.

It appears that the railway in question was built in 1853 or 1854, by a corporation known as the Pittsburg, Fort Wayne & Chicago Railroad Company, and that such corporation owned and operated said railway until about the year 1860, at which date it was sold under foreclosure proceedings, and became the property of a new corporation known as the Pittsburg, Fort Wayne & Chicago Railway Company. At the time of the foreclosure, the original corporation ceased to do business, and since then it has owned and operated no railway, and is not shown to have maintained a corporate existence for any other purpose than that of adjusting such matters as re-

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mained after all its railway property had been swept away by the foreclosure.

The Pittsburg, Fort Wayne & Chicago Railway Company continued to own and operate said railway until some time in the year 1869, when it leased the railway with the appurtenances to the defendant, the Pennsylvania Company, a corporation organized under the laws of Pennsylvania, and ever since that date said railway, together with its engines and cars, has been in the possession of and has been operated by the defendant. The evidence shows that during all the time the railway has been in existence, it has been usually called and known to the public as the Pittsburg, Fort Wayne & Chicago Railroad, or Railway, and the company operating it as the Pittsburg, Fort Wayne & Chicago Company.

On the 3d day of July, 1875, which was two days less than two years after the date of his injury, the plaintiff commenced a suit to recover damages therefor by suing out a summons, and in said summons the defendant was named "The Pittsburg, Fort Wayne & Chicago Railroad Company." That summons was returned "*non est inventus*," whereupon an *alias* summons was issued and returned served on R. C. Meldrum, an agent of said company.

The evidence is undisputed that Meldrum, at the date of the service of said writ, was, and ever since the leasing of the railway to the Pennsylvania Company had been, the general western freight agent of that company, having his office in Chicago. The evidence also shows that, prior to said lease, Meldrum was in the service of the Pittsburg, Fort Wayne & Chicago Railway Company in a similar capacity, but there is no very satisfactory evidence that his agency for that company continued after the execution of the lease, and there is no evidence that he ever was the agent of the Pittsburg, Fort Wayne & Chicago Railroad Company, either before or after the railway passed from the possession of that company by means of the foreclosure proceedings.

The writ having been served as above stated, the plaintiff filed his declaration describing the defendant as the Pittsburg, Fort Wayne & Chicago Railroad Company. Afterward an

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attorney appeared for the defendant and in the same name filed a plea of not guilty. The attorney so appearing was the attorney having general charge for the Pennsylvania Company of all litigation in Chicago in which that company was interested, and receiving from said company a fixed annual salary for his services. It appears also that he had been the attorney at Chicago of both the preceding companies from the time of their organization, and still had authority to appear in their behalf and defend any suits which might be brought against them. It appears from the testimony of said attorney that, being in the employ of all of said companies, he deemed it his duty to appear and defend the suit, and if it turned out to be a suit against the Pennsylvania Company, to defend it under his retainer by that company; that he was not expressly employed by either company to defend; that he was never paid for his services by the Pittsburg, Fort Wayne & Chicago Railroad Company and never presented a bill for his services to that company, but that all the compensation he ever received or asked for was the salary paid him by the Pennsylvania Company.

Upon the issue formed by said plea two trials were had, each resulting in a verdict in favor of the plaintiff. On the 26th day of March, 1877, a third trial was entered upon, and after a portion of the evidence had been introduced, leave was given to the plaintiff, on his motion, to withdraw a juror, and to amend the papers and record in the cause by substituting the name of the Pennsylvania Company as defendant in place of that of the Pittsburg, Fort Wayne & Chicago Railroad Company. The papers and record having been thus amended, a summons was issued March 27, 1877, to the Pennsylvania Company, which was afterward served on that company by delivering a copy to Meldrum, its agent.

The Pennsylvania Company thereupon appeared in its own name and pleaded—first, not guilty; second, that the causes of action did not accrue within two years next before the institution of the suit. Upon these pleas various issues were formed and a trial was had, resulting in a verdict and judgment in favor of the plaintiff. That judgment was reversed by this

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court on appeal for reasons stated in the opinion then filed. Pennsylvania Company v. Sloan, 1 Ill. App. 364. After the cause was reinstated in the court below, all the replications to the plea of the Statute of Limitations previously filed were withdrawn and thereupon the plaintiff filed two replications to said plea, the first of which is substantially as follows:

That prior to and at the time said cause of action accrued, the defendant was a corporation of the State of Pennsylvania, having its chief office and president in that State, but was possessed of and operating a certain railroad known as the Pittsburg, Fort Wayne & Chicago Railroad, extending from the City of Chicago into the State of Pennsylvania, and all the cars, locomotives and rolling stock belonging thereto, and that all the agents, servants and employes operating said railroad were the agents, servants and employes of the defendant; that the causes of action in the declaration mentioned accrued to the plaintiff by reason of the negligence of the defendant's servants and employes in the use and operation of said cars and locomotives; that prior to and at the time said causes of action accrued, one Meldrum was the agent of the defendant in Chicago; that the plaintiff, on the 3d day of July, 1875, sued out a writ of summons and impleaded the defendant in the name of the Pittsburg, Fort Wayne & Chicago Railroad Company, the said Pennsylvania Company then being reputed and known as the Pittsburg, Fort Wayne & Chicago Railroad Company, which summons was returned by the Sheriff not served; that the plaintiff thereupon sued out an *alias* summons against the defendant, by its said reputed name, which *alias* summons was afterward returned served on said Meldrum, the defendant's said agent; that said service of summons being had, the defendant, by its attorney, appeared in said action, and without objection or plea in abatement pleaded to the merits and joined issue in said cause; that, at the April term, 1876, of said court, said cause was tried before a jury and a verdict rendered for the plaintiff; that said verdict was set aside at the instance of the defendant and a second trial had at the October term, 1876, resulting in a verdict for the plaintiff, which verdict was also set aside by the court at the in-

stance of the defendant; that, at the March term of said court, 1877, such proceedings were had, that leave was granted by the court to the plaintiff to amend the record and proceedings by substituting the name of the Pennsylvania Company, whereupon the plaintiff caused a summons to issue against the defendant in that name, which was afterward, and on the 28th day of March, 1877, served on said Meldrum, then still the agent of the defendant; and so the plaintiff says, that this suit is the same suit commenced as aforesaid by summons against the defendant by the name of the Pittsburg, Fort Wayne & Chicago Railroad Company, and that the causes of action in the declaration mentioned, and each and every of them, accrued within two years before the commencement of this suit.

The second replication was substantially like the first, and closed with the same averment, that the causes of action in the declaration mentioned, and each and every of them, did accrue within two years next before this suit was commenced.

Issues were taken on said replication by rejoinders, and the cause again coming on to be tried before a jury, a verdict was rendered finding the issues for the plaintiff and assessing his damages at \$5,000, and for that sum and costs the court gave judgment in his favor. This last judgment is the one brought here by this appeal.

The foregoing replications, when stripped of their verbiage, amount merely to a traverse of the plea of the Statute of Limitations. They aver that the causes of action in the declaration mentioned did accrue within two years next prior to the commencement of the suit, and also set out a number of facts and circumstances which are material only as evidence upon the issue raised by said traverse. The only question to be considered then is, whether the evidence sustains the finding of the jury in favor of the plaintiff upon that issue.

The original summons, which names as defendant the Pittsburg, Fort Wayne & Chicago Railroad Company, was sued out within two years after the date of the plaintiff's injury; while the summons, which names the Pennsylvania Company as

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defendant, was not issued until more than two years after that date. The case then turns upon the question as to which corporation was the real defendant in the original summons. Was that summons issued against the right defendant by a wrong name, or was it issued against the wrong defendant? This is mainly a question of fact upon which the verdict is conclusive, unless it is obviously against the preponderance of the evidence, or is plainly the result of some misconstruction of the evidence by the jury.

It can not be doubted that it was the intention of the plaintiff to sue the corporation which at the time was operating the railway in question, and by the negligence of whose servants he was injured. Not only does he testify that such was his intention, but all the circumstances lead to the same conclusion. It further appears that said railway was very generally known to the public as the Pittsburg, Fort Wayne & Chicago Railroad, and that the corporation operating it was popularly known as the Pittsburg, Fort Wayne & Chicago Railroad Company. The summons when issued was actually served on an agent of the corporation liable for the injury, and against whom the plaintiff intended to bring his suit. The regularly retained attorney of that corporation appeared and conducted the defense. When the error in the name of the defendant was discovered, the record was amended by inserting the true name, and the suit was then prosecuted to judgment.

These facts are in our opinion sufficient to warrant the jury in finding that the plaintiff, in suing out the original summons, intended to bring suit and in fact brought suit against the defendant, the Pennsylvania Company.

If a plaintiff brings suit against A by the name of B, and summons is served on A, and he appears and defends, and judgment is rendered against the defendant in the suit, the judgment is against A and he is bound by it, nor is the case affected in the least by the fact that there is another person in being by the name of B. And in such case, if during the pendency of the suit, the mistake in the name of the defendant is discovered and corrected by inserting the name of A in the record in the place of B, such amendment does not constitute

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the bringing of a new suit against A. Such suit, so far as the Statute of Limitation applies, must be deemed to have been instituted at the time of suing out the original summons. We can not see that any different rule applies where the defendant is a corporation. Service in such case, it is true, can not be made on the corporation itself but must be made on an officer or agent, but when so made, the same legal consequences follow as in case of a personal service of process on a natural person.

No question is, or can be made, that the service was on an agent of the Pennsylvania Company. There is some evidence, though of a very unsatisfactory character, that the same person was also an agent in some capacity of the Pittsburg, Fort Wayne & Chicago Railway Company, the defendant's lessor. But whether he was an agent of that corporation or not is wholly immaterial. That corporation is in no way in question in this suit. There is not, however, a scintilla of proof that said agent was or ever had been in any way the agent of the Pittsburg, Fort Wayne & Chicago Railroad Company. That company had lost all its railroad property by a foreclosure proceeding fifteen years before the date of said service, and had long been out of business and practically extinct. It is clear then that the service was not and could not have been on that corporation.

Service having thus been had on the Pennsylvania Company and on that company alone, an attorney who claims to have had authority to appear for either or all of the three corporations above named, appeared in the case, and, without raising any question as to the style by which the defendant was sued, or as to which of said corporations was really in court, filed a plea of not guilty and represented the defendant at three trials of the cause before the amendment was made. As nothing appears to the contrary, he must be presumed to have appeared and defended for the one of his clients which had been sued, and such presumption is strongly corroborated by the testimony of said attorney above referred to, that, being in the employ of all of said corporations, he deemed it his duty to appear and defend the suit, and if it

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turned out to be a suit against the Pennsylvania Company, to defend it under his retainer by that company.

On consideration of all the evidence we are satisfied with the verdict. We find no substantial error in the instructions to the jury. There being no error in the record, the judgment will be affirmed.

Judgment affirmed.

SETH F. HANCHETT

V.

CHARLES WILLIAMS.

Trover against Sheriff—Demand—Appeal from Justice—Insufficiency of Transcript—Waiver of Objection.

1. Where an officer levies on the goods of one person under an execution against another, and sells them, he is liable in an action of trover. Proof of the sale makes out the conversion, no demand being necessary.

2. Upon appeal from a Justice, if the parties appear and go to trial in the Circuit Court on the merits without objection, the court will have jurisdiction although there is no transcript.

[Opinion filed November 23, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

An action of replevin was commenced by appellee against appellant in Justice Court, and the goods not being found, the writ stood as a summons in trover. Judgment was entered against the appellant by the Justice. An appeal was perfected to the Circuit Court where the case was submitted to the court for trial without a jury, and there was a finding and judgment against appellant for \$150, to review which judgment this appeal is brought.

The evidence tended to show that appellee had four barrels of wine, in all about 220 gallons, in the store of a liquor

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dealer, named Howe. Howe had requested appellee to take it away as he could not sell it, but appellee failed to do so, and it remained in Howe's store at the time appellant, as Sheriff, took possession of the same and the stock of liquors therein, by virtue of an execution against Howe. Appellant demanded the four casks of wine from Matson, appellant's chief deputy, and was told by him that he had better bring a replevin suit to establish his title.

The four casks of wine were in the store when the Sheriff took possession and remained there after he took possession. The levy was upon and included everything contained in the basement and store known as 206 East Jackson Street, and the testimony of the deputy Sheriff shows that all the goods levied on by him were sold and the proceeds turned over to the plaintiff in the execution.

Messrs. MOSES & NEWMAN, for appellant.

Messrs. KRAUS, MAYER & BRACKETT, for appellee.

MORAN, P. J. The court found that the four barrels or casks of wine belonging to the plaintiff were in the store of Howe, and levied upon by the Sheriff as the goods of Howe, and were sold by the Sheriff and the proceeds paid over on the execution. This finding is plainly supported by the evidence but it is contended by appellant's counsel that there could be no recovery against the Sheriff in trover because there was no demand made upon him by appellee for the goods.

Demand and refusal are only evidence of conversion in an action of trover, and if it is shown by the evidence that the goods for which recovery is sought were sold or otherwise disposed of by the person who had the possession of them, then the conversion is proven and it is unnecessary to prove a demand. *Howitt v. Estelle*, 92 Ill. 218; *Kime v. Dale*, 14 Ill. App. 308. An officer who levies on the goods of one person under an execution against another and sells them or loses them, is liable in an action of trover, and no demand is

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necessary, as proof of the sale or loss makes out the conversion. *Duncan v. Stone*, 45 Vt. 118; *Robinson v. McDonald*, 2 Geo. 116; *Burgin v. Burgin*, 1 Ired. 453.

As no demand was necessary under the evidence, it is not worth while to consider whether the demand upon the deputy, Matson, would constitute a good demand upon the Sheriff.

As the appellant appeared and went to trial in the Circuit Court, he can not be heard now to object to the insufficiency of the transcript. Where the parties appear and try the case in the Circuit Court upon its merits, without objection, the court will have jurisdiction without a transcript, and the evidence will be looked into to see what the demand was and what the defense.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

SINGER, NIMICK & COMPANY, LIMITED, ET AL.,

V.

HENRY T. STEELE.

Attorney and Client—Bill for Accounting—Collection of Accounts—Agency—Value of Services—Special Agreement—Practice.

Upon a bill, against an attorney, for an accounting, it is *held*: That the decree dismissing the bill for want of equity was warranted by the evidence; that it was entirely proper for the defendant to employ his law partner to collect certain claims belonging to the complainant; that the failure of the defendant to preserve a memorandum from which he could give a detailed account of said claims upon demand, was not such negligence as should render him liable to account on the basis of a wilful default; that he was only chargeable with the actual amount collected by him or his agent; that he was properly allowed credit for the reasonable value of the services rendered by him or his agent in collecting or attempting to collect said claims, their collection not being within a certain special agreement to collect and remit the proceeds of certain notes, in lieu of which they were taken; and that, if the evidence did not fairly warrant the finding of the master as to the value of said services, the appellant could not first raise the objection here.

Singer, Nimick & Co. v. Steele.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. GARDNER, McFADON & GARDNER, for appellants.

Mr. JOHN MCGAFFEY, for appellee.

BAILEY, J. This was a bill in chancery, brought by Singer, Nimick & Company, Limited, a corporation, against Henry T. Steele, for an accounting. For some fifteen years prior to February, 1878, the defendant had been the attorney at Chicago of the firm of Singer, Nimick & Company, of Pittsburg, Pennsylvania. About that date said firm placed in his hands, for collection or settlement, a claim in their favor against N. S. Bouton, of Chicago, amounting to \$15,720. After considerable negotiation, the defendant effected a settlement of said claim by taking certain real estate in Illinois, Kansas and Nebraska, valued at \$7,500, about \$1,120 in money, and about \$7,100 in seven notes of the Chicago Plow Company, a corporation then in good credit. Of said notes, six were for \$1,000 each, maturing respectively on the first day of April, June, August, October and December, 1878, and February 1, 1879. The seventh note was for \$1,097.32, maturing April 1, 1879. As a part of the settlement it was agreed between the defendant and the plow company that said company might take up said notes, or any of them, at any time before maturity, by substituting in their place notes of said company's customers for like amount and maturing within the same time. For convenience in making the collection or exchange, said notes were drawn payable to the defendant. Said settlement was reported by him to Singer, Nimick & Company, and by them approved.

In a letter written by the defendant to Singer, Nimick & Company, under date of February 25, 1878, communicating to them certain matters connected with the settlement, he expressed the opinion that every dollar was secured, and asked

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permission to retain \$321.98 of the cash payment then in his hands on account of fees, saying: "No further charge or claim for services will be made for attending to the collection and remittance of the proceeds." In another letter, dated March 29, 1878, he wrote: "Hitherto I have made no mention of fees and charges for services in the settlement of the N. S. Bouton claim, except the retaining of the \$321.98 cash on settlement to apply on same, as advised in mine of 25th ult. In this matter, inasmuch as no further charge is to be made for collecting and remitting as the paper falls due, it has seemed to me that the sum of \$500 would be a fair and a proper charge in full for fees and services in this case, and if upon the coming settlement of the Chebanse purchase you will allow me to retain the balance on making remittance, it will be very acceptable, being \$178."

Under the arrangement with the plow company, two of the notes, the first and seventh, were surrendered to said company in exchange for notes made by various of its customers, and said notes, with the exception of a small amount, were collected and remitted by the defendant. The second note not being paid at maturity, the defendant induced the plow company to turn over to him as collateral four notes, of which he collected one and compromised the other three, and remitted the proceeds to Singer, Nimick & Company. The total amount thus collected and remitted by the defendant was about \$2,850. The remaining notes were not collected, so that there remained uncollected a small balance of the second note and the four remaining notes of \$1,000 each.

Some time during the year 1878 the defendant entered into a copartnership with J. Blackburn Jones, a member of the Chicago bar, which partnership continued until 1882. In the summer of 1878, and after the formation of said partnership, Singer, Nimick & Company employed Jones, at a time when the defendant was temporarily absent from Chicago, to go to Kansas to examine some lands for them, but in all subsequent matters they seem to have refused to recognize Jones as their attorney, and to have insisted upon looking to the defendant alone for the transaction of all business connected with

the plow company notes. On the 3d day of February, 1879, the plow company being badly pressed by its creditors, and being in a failing condition, the defendant induced said company to turn over to him such assets as they had in the form of choses in action and claims against various parties, for the benefit of Singer, Nimick & Company. There is a dispute as to whether these assets were turned over to the defendant by the plow company in payment of or as collateral to its said notes, but the court found that they were turned over to him as collateral and not as payment, and the evidence tends to support such finding. Said claims aggregated a large amount and were supposed to be sufficient to pay the entire indebtedness. A schedule of said claims was made out and delivered to the defendant, and an assignment thereof executed to the firm of Steele & Jones.

The task of looking up and collecting the claims thus assigned was committed by the defendant entirely to Jones, and he immediately started on a trip through several of the western States, visiting the debtors so far as he could find them and addressing those whom he failed to see, by letter, being absent on such trip one week. Some months later he made another similar trip, the expenses of both trips being paid by the defendant. A large portion of said claims proved to be uncollectible, only about \$730 in all being collected. It is claimed that the assignment of said claims was obtained by the defendant wholly without the knowledge or consent of Singer, Nimick & Company, and that the efforts made by the defendant, through his partner, Jones, to collect said claims, was without their knowledge, procurement or approval. Whether this be so or not, it does not appear that they in any way disaffirmed the defendant's act in obtaining said assignment when they learned of it, but on the contrary, it appears that they frequently demanded of the defendant an account of the money collected, and in the bill the complainants claim the benefit of the assignment, and pray that the defendant be required to account for the moneys so collected.

In July, 1881, Singer, Nimick & Company became incorporated under the name of Singer, Nimick & Company,

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Limited, and assigned to said corporation their claim against the defendant. The agent of the firm before the incorporation, and the agent of the company afterward, on several occasions, applied to the defendant for a statement of the claims assigned as aforesaid, but as the schedule of said claims had been placed in Jones' custody, together with all other memoranda connected with the matter, the defendant referred the agent to him for information, but said agent refused to see Jones, but demanded an account of the defendant, who personally had nothing to do with said claims and knew nothing of the details in respect to them.

The cause being heard on pleadings and proofs, the court found that the defendant was liable to account to the complainants for the moneys collected on said claims, and that he was entitled to credit for the reasonable value of Jones' services in collecting and attempting to collect the same. The cause was thereupon referred to the master to state the account between the parties upon the principles thus laid down, and the master, in stating the account, charged the defendant with the sum of \$730, the amount of the moneys collected, and found the value of Jones' services to be \$1,400, thus leaving a balance, in the defendant's favor, of \$670. Said report of the master was confirmed by the court, but as the defendant had filed no cross-bill, the court refused to render a decree in his favor for said balance thus appearing to be due him, but dismissed the bill at the complainants' costs for want of equity.

Without attempting to notice in detail the numerous criticisms of appellant's counsel upon both the interlocutory and final decrees, we are of the opinion that the decree is fully warranted by the evidence. It was entirely proper, so far as we can see, for the defendant to employ Jones, his partner, to collect the claims turned over by the plow company. It is not pretended that Jones was not a lawyer of standing and ability, or that he was not entirely competent to perform the duties growing out of such employment, and it is not shown that he was not faithful and diligent in their performance. That he was not more successful was doubtless owing to the character of the claims given him for collection. The evidence shows

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that all the moneys collected by Jones were accounted for, and that the defendant had in his hands at the hearing, ready to be delivered to the complainants, all of said claims not collected.

The contention of the complainants seems to be, that by giving over the entire charge of the collection of said claims to another and keeping in his hands no memorandum from which he could give to the complainants, whenever they saw fit to call for it, a detailed account of the nature, description and condition of said claims, the defendant was guilty of such negligence as should render him liable to account on the basis of wilful default, that is, to be held liable to account for all such claims as he might not be able to show on the accounting could not have been collected by the exercise of ordinary diligence. Without attempting to define or classify the cases where an accounting party may be charged on the basis of wilful default, it seems very clear that there are no facts shown here which can invoke an application of the principles which govern cases of that character. No such consequences can follow from the employment of another to collect the claims, so long at least as the agent employed was competent and performed the duties of his agency with faithfulness and diligence. Nor does the fact that the defendant placed in his agent's hands all his memoranda in relation to the claims to be collected, make out a case of wilful default, especially as it is not shown that any prejudice resulted therefrom to the complainants. But even if this were otherwise, the bill is not framed upon the theory of a wilful default, and where that is the case, only ordinary relief can be given. We see no ground for charging the defendant anything beyond the actual amount of the moneys collected by him or his agent.

Was the defendant entitled to credit for the reasonable value of the services rendered by him or his agent in collecting or attempting to collect said claims? The only ground upon which it is suggested that he should have rendered such services without charge is, that at the time of settling the Bouton claim and taking the plow company's notes, the defendant charged \$500 for his services and agreed that there should be no further charge for collecting and remitting as said notes should fall

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due. At the time that agreement was made, the plow company was in good credit and solvent, and we may fairly conclude that the parties expected the notes to be paid by the maker at maturity, and that it was not within their contemplation that there should be any litigation in the premises. The collection and remittance stipulated for, it would seem, were the collection by mere presentment at maturity, and the remittance of the money as it should be thus paid. But however that may be, the agreement to collect the plow company notes without charge did not embrace within its terms the collection without charge of claims against a great number of parties scattered over a number of States, which the plow company might turn out as collateral to its notes. That service was clearly beyond and additional to what the contract called for.

We can not say that the amount, found by the master to be due the defendant for services, is too large. The evidence fairly warrants said finding, and besides, we are unable to ascertain from the record that the complainant filed any exceptions to the master's report challenging the amount of credits allowed to the defendant. Having failed to except below, he can not be permitted to do so here. But if we were inclined to think that the master's estimate was too large, or that he had included items of services which should have been rejected, it would not follow that the decree is erroneous. The balance of \$670 found due him has not been given him by the decree, and the reduction of the master's finding by that sum eliminates all errors in that respect, which, under the evidence, can possibly be claimed.

We find no substantial error in the record. The decree will therefore be affirmed.

Decree affirmed.

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JOSHUA EMERY

V.

MARY GINNAN.

24	65
73	357

Malicious Prosecution—Malicious Use and Abuse of Process—Distinction—Term—Motion of Original Proceeding—Probable Cause—Compromise or Settlement—Waiver—Estoppel—Instructions.

1. There is a distinction between an action for a malicious abuse and a malicious use of civil process, such distinction having reference to the termination of the action in which the process issued.

2. Where there is a just claim in suit, and civil process is maliciously used to arrest the defendant, in order to recover for such malicious use of legal process, it is necessary to prove that it was malicious and without probable cause and that the suit or proceeding was finally determined before action was brought for the injury.

3. The termination of the suit or proceeding must be such as does not admit a reasonable cause for prosecution. A termination by compromise or settlement between the parties is such an admission of probable cause by the defendant as will estop him from its subsequent denial.

4. In the case presented, it is *held*: That an instruction, which attempts to enumerate all the elements necessary to sustain plaintiff's cause of action, is fatally defective, because it ignores and excludes from the consideration of the jury certain evidence tending to show a dismissal of the original proceeding as the result of a settlement between the parties; and that another instruction was improperly amended by the court so as to make one part conflict with the other.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

The declaration in this action was for maliciously, and without probable cause and by means of a false affidavit, procuring a writ of *capias* to be issued by Justice of the Peace, and the plaintiff to be arrested by a Constable, and while so under arrest by threats and imprisonment, extorting from plaintiff's possession a certain warehouse receipt for certain goods, and wrongfully compelling plaintiff to indorse said warehouse

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receipt to the defendants, by means whereof defendants obtained and took possession of certain goods of plaintiff of the value of \$285.

That thereupon said Constable, at the instance of defendants, discharged and set at liberty the plaintiff, and afterward procured said writ of *capias*, and the suit in which the same was issued, to be dismissed at their costs. The affidavit, which was alleged to be false, was as follows:

STATE OF ILLINOIS }
COUNTY OF COOK. } ss.

Joshua Emery, being first duly sworn, says that he is about, on behalf of John J. Henry, George E. Hatch and himself, composing the firm of Henry, Hatch & Emery, of Chicago, Cook County, Illinois, to commence an action of assumpsit before D. J. Lyon, Esq., Justice of the Peace in and for said Cook County, against Mrs. J. L. Ginnan of said county; that the said Mrs. J. L. Ginnan is justly indebted to said Henry, Hatch & Emery, composed as afore-said, in the sum of \$184.25, for boots and shoes heretofore sold by said Henry, Hatch & Emery to said Ginnan; that heretofore, to-wit, on the 26th day of May, 1884, said Ginnan was running a store at No. 111 Blue Island Avenue, in said City of Chicago, and had therein a large stock of boots and shoes of large value, a portion of which was the same property so sold to her as above set forth; that on the said last mentioned date said Ginnan secretly removed said stock of goods to some place unknown to this affiant, and that the agents of said affiant had made diligent search for the same, but had been unable to find them. Affiant further states that said Ginnan has removed her residence to a house on School Street in said city, and that the clerk of affiant has called there and made effort to see said Ginnan, but she has concealed herself and refused to respond to requests to see her in reference to said account, as affiant is informed and believes. And affiant states that said Ginnan has concealed, removed, assigned and disposed of her said property with intent to defraud said firm and her other creditors. And this affiant further states that he fully believes the benefit of whatever judgment said Henry,

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Hatch & Emery may obtain in this behalf, will be in danger of being lost unless said Ginnan be held to bail.

(Signed) JOSHUA EMERY.

It was admitted on the trial by plaintiff that at the time of the commencement of the suit before the Justice she was indebted to the plaintiffs in said suit in about the sum of \$85, as near as she could tell, but she denied that she had in any manner concealed herself or removed or concealed her goods with intent to defraud said firm.

Defendants offered evidence tending to show that after she was arrested on the *capias* by the Constable, she requested to be taken to the store of defendants, and that when brought there the Constable said to defendants in her presence that she wanted to settle with them; that thereupon there were some negotiations, and she presented a warehouse receipt and said it was all she had to show; that she had borrowed \$50 on the goods; that thereupon plaintiff and a Mr. Duffield, the clerk of defendants, and the Constable, went with plaintiff to the warehouse where the goods were stored, and that Duffield, acting for defendants, said that to avoid all trouble they would pay the money that had been borrowed on the goods, and take the goods if she would turn them over. That thereupon plaintiff signed the book and authorized the warehouseman to deliver the goods to defendants, and then plaintiff went home. Plaintiff claimed she did not settle, but turned over the goods to defendants, and expected that when they sold them they would give her some account of them.

Defendants claimed they took the goods in settlement of the claim for which they had brought suit, and after the settlement dismissed the suit, and that the goods were not of sufficient value to pay the amount of their bill against plaintiff.

There was a verdict and judgment against defendants for \$1,500.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellant.

The plaintiff must prove both a want of probable cause and malice to recover; and if the defendant shows either probable cause or good faith, the action will not lie. *Jacks v. Stim-*

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son, 13 Ill. 701; Barrett v. Spaid, 70 Ill. 498; Leidig v. Rawson, 1 Scam. 272; Splane v. Byrne, 9 Ill. App. 392; Comisky v. Breen, 7 Ill. App. 369.

The plaintiff has admitted that there was probable cause by settling the demand. Cooley on Torts, 186; Hurd v. Shaw, 20 Ill. 354; Barrett v. Spaid, 70 Ill. 408; Sartwell v. Parker, 5 N. E. Rep. 807; Jones v. Given, Gilbert's Cases, 185; Clark v. Everett, 2 Grant, 416; Mayer v. Walker, 64 Pa. St. 287.

Messrs. GEORGE W. BRANDT and ELI B. FELSENTHAL, for appellee.

MORAN, P. J. There is a distinction recognized and established by the authorities between an action for a malicious abuse of legal process, and a malicious use of legal process.

Where the action is for abuse of process it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was sued out without reasonable or probable cause. Granger v. Hill, 4 Bing. (N. C.) 212.

But where there is just claim in suit, and civil process is maliciously used to arrest the defendant when no probable cause for such arrest exists, it is necessary in order to recover for such malicious use of legal process to prove that it was malicious and without probable cause, and also that the suit or proceeding was finally determined before action brought for the injury. Mayer v. Walter, 64 Pa. St. 283.

This case, while it is called by appellee's counsel an action for abuse of legal process, is in the frame of the declaration, and in the theory on which it was tried in the court below, an action for malicious use of civil process. Appellee alleged in her declaration and sought to prove on the trial, that the *capias* was sued out maliciously and without probable cause, and that the prosecution was terminated before she commenced this action.

To establish that the prosecution was so legally terminated as to permit the maintenance of this action, it was not necessary for appellee to show that the merits had been determined in her favor; it was sufficient to show the voluntary dismissal

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or abandonment of the prosecution by plaintiff in the action or proceeding. But where the proceeding is dismissed or abandoned by the procurement of the party prosecuted by settlement or compromise with the prosecutor or plaintiff in the action, it is not, it seems, such a termination of the proceeding as that a suit for malicious prosecution can be maintained.

The termination must be such as does not admit a reasonable cause for prosecution. If the prosecution should end with a judgment adverse to the party prosecuted criminally, or arrested in a civil suit, it would establish not only that there was probable cause but that there was actual cause for the proceeding, and where the termination of the case is brought about by a compromise or settling between the parties, understandingly entered into, it is such an admission that there was probable cause that the plaintiff can not afterward retract it and try the question, which by settling he waived.

“If he settled the demand understandingly and voluntarily, he is estopped from denying that the defendant had probable cause for bringing the suit. If he would contest the claim, he should have protested against his liability. If a party is silent when self-interest commands him to speak, he will not be permitted to speak when public policy commands him to keep silent.” *Morton v. Young*, 55 Me. 27.

So in *McCormick v. Sisson*, 7 Cow. 715, where the plaintiff had been arrested on a charge of theft but during the examination before the Justice the matter was settled and the proceeding was dropped, the court held that the proceeding, having ended in consequence of a settlement and not by an acquittal, was fatal to the action for malicious prosecution. And in *Clark v. Everett*, 2 Grant's Cases, 416, where one was arrested on a debt not due but compromised the matter and paid the money, and was discharged from the debt and the action, it was held that he was precluded from maintaining an action for maliciously bringing the suit before the debt was due. Judge Cooley in his work on Torts, 186, in discussing what is an end of the proceeding, says: “It is not enough that the parties in a case which they might lawfully settle, have effected a compromise and thereby terminated it.”

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This is substantially the view taken in every case we have been able to find where the question has been presented. *Hamilburg v. Shepard*, 119 Mass. 30; *Marks v. Gray*, 42 Me. 86; *Rounds v. Humes*, 7 R. I. 535; *Brown v. Randall*, 36 Conn. 56; *Sartwell v. Parker*, 141 Mass. 405.

There was in this case a conflict of evidence on the question as to whether there was a settlement between plaintiff and defendants. Plaintiff's contention was that her goods were extorted from her by threats and duress, and that she did not settle, and defendants introduced evidence to show that there was a settlement and that the goods were turned over by plaintiff to them in payment of the debt, and thereupon plaintiff was discharged from arrest and the suit against her dismissed. In this condition of the evidence the court gave to the jury at the instance of plaintiff the following instruction:

"Third. If the jury believe from the evidence that the defendant maliciously and without probable cause procured the plaintiff to be arrested and treated as charged in the declaration, and that the suit in which said plaintiff was arrested was dismissed, and the prosecution against the plaintiff ended before this suit was brought, then the jury are instructed that they should find the defendant guilty, and assess the plaintiff's damages, and in such case the jury may give exemplary damages, and such as under all the circumstances appearing in evidence, the jury shall deem just."

This instruction attempts to enumerate all the elements necessary to sustain plaintiff's cause of action. It purports to cover the whole case, yet it ignores and excludes from the consideration of the jury the evidence tending to show that the prosecution was dismissed because of the settlement between the parties. It was for the jury to determine whether the dismissal of the proceeding was brought about by a compromise or settlement between the parties, and it was error to instruct them that if they found the suit against plaintiff was dismissed and the prosecution ended before this suit was brought, they might find defendants guilty. The instruction would be correct if there was no evidence to show that the

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suit was settled, but there being evidence before the jury tending to prove a fact having an important bearing on the law of the case, the instruction was partial and incomplete without a hypothesis negating the conclusion which such evidence tended to establish. *Chicago Packing & Provision Co. v. Tilton*, 87 Ill. 547.

The court modified one of defendants' instructions so that as given to the jury it read as follows, the modification by the court being in italics:

"The court instructs the jury, that the plaintiff having dismissed her count in the declaration for conspiracy, the only issue remaining is that in relation to malicious prosecution, and the jury are instructed that in an action of malicious prosecution it is incumbent on the plaintiff to prove by the preponderance of evidence that the suing out of the writ complained of was procured by the defendant maliciously and without probable cause. Both of those elements must co-exist, otherwise the action can not be sustained. *So if you believe from the evidence that the defendant had probable cause and instituted the proceedings against the plaintiff and caused said writ to be issued in good faith and without malice*, then you must find defendant not guilty."

The first part of the instruction states the law correctly, the latter part erroneously. One part is in conflict with the other. It is impossible to determine which part of the instruction the jury followed. The lack of harmony between the rules stated in the instruction tended to mislead, and in such case, unless we can clearly see that the error could not have operated injuriously, we must reverse. *C., B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *Quinn v. Donovan*, 85 Ill. 194.

For the errors indicated, the judgment of the Superior Court will be reversed and the case remanded.

Reversed and remanded.

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24	72
87	299

24	72
118	156

M. D. BROWN

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Scire Facias for Final Judgment upon Recognizance—Forfeiture—Default—Time to Appear in Justice Court—Jurisdiction.

1. In order to maintain a proceeding by *scire facias* for final judgment upon a recognizance, a regular judgment of forfeiture, rendered prior to the commencement of such proceeding, must be shown.

2. It is indispensable to a legal default and declaration of forfeiture of a recognizance, that the principal should have been regularly called, and upon such call failed to appear.

3. By the common or unwritten law of this State, in proceedings before Justices of the Peace, which are notified to begin at a fixed hour, neither party is in default until the expiration of that hour and the commencement of the next.

4. In the case presented, it is *held*: That the evidence failed to show that either the principal or surety was called by the Justice; and that the principal had all the time between the hour set and the commencement of the next in which to appear.

5. It *seems* that, as in preliminary examinations a Justice of the Peace is an officer of general powers, jurisdictional facts need not be shown in a proceeding by *scire facias* for final judgment upon a recognizance.

[Opinion filed November 23, 1887.]

APPEAL from the Criminal Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This is an appeal from the judgment of the Criminal Court of Cook County against appellant, M. D. Brown, in a proceeding by *scire facias* upon a recognizance executed and taken before a Justice of the Peace, March 21, 1885, by Samuel Goldstein as principal and said Brown as surety, in the sum of \$500, containing the following condition: "Whereas, the above bounden Samuel Goldstein, on the 21st day of March, A. D. 1885, was brought before Edward A. Fisher, a Justice of the Peace in and for the county aforesaid, on a charge preferred against him for burglary, and the further examination

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of the said Samuel Goldstein having been continued to the 30th day of March, A. D. 1885, at 8 o'clock A. M., and the said Samuel Goldstein having been adjudged and required by the said Justice to give bonds required by the statute in such case made and provided for his appearance to answer said charge, now the condition of this recognizance is such that if the above bounden Samuel Goldstein shall personally be and appear before the undersigned at my court room, in the city of Chicago, in said county, on the 30th day of March, A. D. 1885, at 8 o'clock A. M., then and there to answer to the people of the State of Illinois on said charge, and abide the order and the judgment of said court, and not depart the same without leave, then and in that case this recognizance to become void, otherwise remain in full force and virtue."

The *scire facias* sets out the recognizance in words and figures; avers that on the 30th day of March, 1885, the said Justice of the Peace was holding court for the transaction of business at his said court room, and that the said Samuel Goldstein being then and there three times solemnly called to answer the charge preferred against him in said recognizance set forth, came not, nor any person for him, but therein failed and made default; and the said M. D. Brown being then and there three times solemnly demanded that he bring the body of the said Samuel Goldstein into court or that his recognizance be declared forfeited, came not, nor did he produce the body of said Samuel Goldstein, but made default therein, which was duly taken and certified upon said recognizance and which was duly filed in the office of the clerk of the Criminal Court, on the 11th day of May, 1885, and then and there became matter of record; then followed the summons part in due form.

The defendant, Brown, pleaded to that part of the *scire facias* setting out the judgments of default and forfeiture by the Justice court, the plea of *nul tiel* record, and to all the averments of the writ, *nil debet*; on which issue was joined.

On the trial before the court, without a jury, the court permitted the State's Attorney, against the objections of the defendant, Brown, to give in evidence in support of said

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averments as to said judgment of default and forfeiture, the following indorsements by the Justice on the back of said recognizance.

“The People of the State of Illinois v. Samuel Goldstein.

“Recognizance for further examination.

“Amount.....\$ 500.00

“Justice’s costs..... 2.30

“March 30, 1885. This recognizance is declared forfeited for want of appearance of Samuel Goldstein, the principal therein named, at the time mentioned therein viz., March 30, 1885, at 8 A. M.

[SEAL]

“EDWARD A. FISHER, J. P.”

The State’s Attorney was also allowed by the court to give in evidence, against the objection of defendant, Brown, the transcript of said Justice’s docket, of all the proceedings in the case before said Justice; from which it appears that at 8 o’clock A. M., March 30, 1885, the said Justice declared the said recognizance forfeited, and from which transcript it nowhere appears that the said Justice waited any after that time, or that either the said Goldstein, the principal, or Brown, the surety, was called in any manner.

There was no other evidence; and the court found the issues for the people, and gave judgment against Brown for the amount in said recognizance, from which he prosecutes this appeal, assigning for error, (1) that the recognizance was void for want of recital therein of facts showing that the Justice had jurisdiction; (2) that evidence of a proper judgment of forfeiture was wanting; (3) that there was a fatal variance between the averments in the *scire facias* as to such judgment of forfeiture, and the proof.

Mr. M. D. BROWN, in person, appellant.

No brief filed for appellee.

McALLISTER, J. It is well settled law in this State that, in order to maintain a proceeding by *scire facias* for final judgment upon a recognizance, a regular judgment of forfeiture, rendered prior to the commencement of such proceeding,

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must be shown. Thomas v. People, 13 Ill. 696; Kennedy v. People, 15 Ill. 418; Cable v. People, 46 Ill. 467; Banta v. People, 53 Ill. 434; Farris v. People, 58 Ill. 26.

In conformity with that rule the *scire facias* avers that on the day named in the recognizance, Goldstein (the principal) being then and there three times solemnly called to answer the charge preferred against him, came not, nor anybody for him, but therein made default; and that Brown (the surety) being then and there three times solemnly demanded that he bring the body of said Goldstein into court, or that his recognizance be declared forfeited, came not, nor did he produce the body of said Goldstein, but made default therein, which was duly taken and certified upon said recognizance. These averments were properly denied by a plea of *nul tiel* record, on which issue was joined. The burden was, therefore, upon the plaintiffs to sustain their said averments by competent evidence. The only evidence offered in that behalf was the entry by the Justice upon the back of the recognizance set out in our statement of the case, and the transcript from the Justice's docket, from neither of which did it appear that either principal or surety was called at the time in question.

We are of opinion that the evidence adduced not only failed to support said averments, but that it was indispensable to a legal default and declaration of forfeiture, that the principal in the recognizance should have been regularly called, and upon such call failed to appear. Dillingham v. United States, 2 Wash. 422; State v. Chesley, 4 N. H. 366; State v. Grigsby, 3 Yerg. 280; White v. State, 5 Yerg. 183; Park v. State, 4 Ga. 329; United States v. Rundlet, 2 Curtis, 41; Cable v. People, 46 Ill. 467; Banta v. People, 53 Ill. 434.

But there is another reason why there was no legal breach of the condition of the recognizance shown. That condition was that Goldstein should personally be and appear before said Justice on the 30th day of March, 1885, at 8 o'clock A. M., to answer, etc.

Now, the evidence adduced by plaintiffs not only fails to show a call upon Goldstein, but it shows that the Justice did not wait the expiration of an hour from 8 o'clock, but declared a forfeiture at 8 o'clock A. M. of that day. By the common,

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or unwritten law of this State, it is the rule that in proceedings before Justices of the Peace, which are notified to begin at a fixed hour, neither party is in default until the expiration of that hour and the commencement of the next. This is a convenient rule, prevents surprise and exacts as much promptness as is safe and reasonable. That it prevails in this State is understood by the courts and the legal profession, as well as by the generality of the community. Therefore the legal effect of the condition of the recognizance in question was that the party had all the time between 8 o'clock and 9, in which to appear, and no default before the beginning of the latter hour could be legal. *United States v. Rundlet*, 2 Curtis, 41.

The views expressed render it unnecessary to discuss the other point made, viz.: That there was nothing in the case showing the facts necessary to give the Justice jurisdiction.

As an outcome of the doctrine that Justices' courts are courts of statutory and limited jurisdiction, and that their jurisdiction must always be made to appear, it has been held, that in proceedings by *scire facias*, upon a recognizance taken before such magistrate, such jurisdictional facts must appear from the recognizance; and in an action upon one, they must appear by averments in the declaration. In the case of *The People v. Koeber*, 7 Hill. 39, that doctrine was enunciated and all the then reported cases were cited. But that case as to that point was overruled in the case of *The People v. Kane*, 4 Den. 530, and *Champlain v. People*, 2 N. Y. 81. Many cases follow the doctrine of those two latter cases and hold that a Justice of the Peace, as to preliminary examinations in criminal cases, is an officer of general powers in that behalf, and jurisdictional facts need not be shown. *Adams v. The Governor*, 22 Geo. 417; *State v. Randolph*, 22 Mo. 475; *State v. Grant*, 10 Minn. 39; *U. S. v. George*, 3 Dill. C. C. 431. And the case of *McFarlan v. People*, 13 Ill. 9, following the decisions in Kentucky, adopts the same view.

But the objection, of a want of a regular judgment of forfeiture, is insuperable and fatal to any recovery, wherefore the judgment against appellant must be reversed.

Judgment reversed.

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OLIVE RHEA
v.
GEORGE W. POWELL.

Attachment—Capital Stock of Corporation.

Shares of stock in a corporation are not subject to attachment under the statute of this State.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. LINCOLN BROOKE and E. WALKER, for appellant.

Mr. I. K. BOYSEN, for appellee.

MCALLISTER, J. This is an appeal by Rhea, the plaintiff below, in a suit by attachment against appellee, brought January 5, 1885, in which the defendant traversed by plea the facts of the affidavit for the attachment, and upon that issue the court, before whom the case was tried without a jury, found for the defendant and gave judgment accordingly.

It is insisted, upon argument here for the appellant, that such finding was against the law and the clear preponderance of the evidence. The issue as tried was, whether the defendant had, or was about to, fraudulently dispose of property with the intent and so as to hinder, delay and defraud his creditors, of whom plaintiff was one. It appears that the attachment was levied upon 210 shares of stock in a manufacturing corporation, standing in the name of the defendant on the books of said company, and on no other property.

The theory of the plaintiff in support of said issue was, that a specific lien upon said shares having been acquired by such levy, the defendant had, soon after such levy, transferred ten shares of said stock of the face value of \$100 each to one Kinsey to secure an antecedent debt which he owed to the

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latter; that this was a fraud *per se*, and the presumption must be that it was in pursuance of a prior intent and purpose to hinder and delay plaintiff in the collection of her debt, he having previously assigned or pledged all the other of such shares to *bona fide* creditors, and it did not appear that he had any other property.

The counsel for appellant assume that a specific lien upon the shares of stock was acquired by the levy of the attachment. Were they correct in that assumption? After a careful examination of our statutes and due consideration of the principles of law applicable to such a case, we are of opinion that no lien was acquired thereby.

It is well settled that shares of stock in a corporation were not leviable at common law. *Denton v. Livingston*, 9 Johns. 96; *Williamson v. Smoot*, 7 Mart. O. S. (La.) 31. "But shares in a turnpike, or other incorporated company, are not chattels. They have more resemblance to choses in action, being merely evidence or property. The sale of them upon execution not being justifiable at common law, the statute must be strictly pursued to give any property to the purchaser." Parker, C. J., in *Howe v. Starkweather*, 17 Mass. 243.

It is equally well settled that a proceeding by attachment has no existence at common law, but is authorized solely by statute and is in derogation of the common law. Hence, the proceeding must, in all essential particulars, conform to the statute of its creation, or be invalid. *Haywood v. Collins*, 60 Ill. 328, and cases there cited; *Waples on Attach.* 24. On page 270 that author says: "It may be said that except so far as statutes expressly authorize the taking of promissory notes, bonds, certificates of stock, accounts, title deeds to lands, book accounts and other evidences of debt or property, such things are not attachable on general principles, because their presence in court is not the presence of the debts or property which they evidence or indicate." And he cites numerous cases in support of the text, among them that of *Prout v. Grout*, 72 Ill. 456.

The Attachment Act of this State does not expressly authorize a levy upon shares of stock, nor attempt to prescribe any

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method by which levy can be made. Such levy was therefore unauthorized. *Foster v. Potter*, 37 Mo. 526; *Van Norman v. The Circuit Judge of Jackson County*, 45 Mich. 204. In the last cited case, the statute authorizing the levy of an *execution* upon shares was precisely like that in this State; and the court held that it was insufficient to authorize the levying of the *attachment*.

But aside from the want of statutory authority to levy an attachment upon such shares of stock, we think the evidence failed to show, by any clear weight and preponderance, that the defendant did in fact make the transfer of ten shares to Kinsey after the beginning of the attachment suit. It tended strongly to show that defendant had agreed to do it before he had any notice or knowledge that the bringing such suit was contemplated and that it was in good faith for a *bona fide* debt. The judgment below should be affirmed.

Affirmed.

ANDREW MATTSON

V.

BENEDIX G. BORGESON.

Practice—Bill of Exceptions—Form of Verdict—Presumption of Regularity.

In the absence of anything to the contrary appearing in the bill of exceptions, it will be presumed that the verdict as set out in the record was returned in open court and in proper form.

[Opinion filed November 23, 1887.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. H. H. ANDERSON, for appellant.

Messrs. BLANKE & CHYTRAUS, for appellee.

Johnson v. Johnson.

Per Curiam. The ground of error alleged in this case is that the jury did not pronounce their verdict in open court, nor was the verdict reduced to writing and signed by the foreman of the jury. On examining the record we find a formal verdict set out in it, as returned by the jury in open court. The bill of exceptions contains no statement as to the form in which the verdict was rendered, and we must therefore presume the verdict, as set out in the record, to have been returned in open court in proper form.

The bill of exceptions shows no exception whatever to the manner of returning the verdict.

The judgment must be affirmed.

Judgment affirmed.

MATHEW JOHNSON

V.

ANNA CHRISTINE JOHNSON.

Husband and Wife—Separate Maintenance—Evidence—Alimony and Solicitor's Fees.

Upon appeal from a decree allowing separate maintenance, it is *held*: That the finding of the court below, that the wife was living separate and apart from the defendant without her fault, is sustained by the evidence, which was conflicting; and that the allowance for alimony and solicitor's fees, although "full liberal," was not, in view of all the circumstances, so excessive as to require a reversal.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. HENRY W. MAGEE and C. M. HARDY, for appellant.

Messrs. HUTCHINSON & PARTRIDGE, for appellee.

The amount allowed is \$80 per month. This amount was

fixed by the court upon an agreement of parties that the defendant was worth \$50,000 or more, and that his income above expenses was not less than \$3,000 per annum.

Defendant testifies that his income "was between five and six thousand dollars a year." The amount allowed by the court is therefore less than one-third of his income, and the income consisted principally of rents from his building on Chicago Avenue.

The manner and style of living, together with the income and property of the defendant, determine the amount of allowance, and any amount less than one-third of his income is reasonable.

The amount of solicitor's fees was submitted to the court without additional evidence. The several motions and the trial was had before the chancellor, and he was fully cognizant of the services rendered. Many affidavits were taken, motion for temporary alimony was bitterly contested; the suit was pending more than eight months; negotiations for settlement were had; the trial occupied several days, and the amount fixed by the court was less than compensation for services rendered. \$150 had been paid, and \$350 more was allowed for services rendered prior to the appeal, and \$225 was ordered to be paid as solicitor's fees on the appeal to this court.

Per Curiam. This is an appeal from a decree finding that appellee was living separate and apart from appellant, her husband, without her fault, and ordering the payment of alimony and solicitor's fees. The evidence of appellant and of appellee is in direct conflict as to the acts of cruelty alleged and as to the general treatment of appellee by appellant. We find that appellee's account of their quarrels and of appellant's conduct toward her derives support from the testimony of other witnesses, but if this were not so, as the witnesses testified orally before the chancellor, and he had the same means for judging of their credibility as a jury would have, we would not be authorized to reverse his finding of the facts unless such finding was clearly unauthorized by the evidence. It is clear that the trial court believed appellee and her

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witness, and taking her account as true we are unable to say that the decree, that she was living apart from her husband without her fault, is not supported by the evidence.

A woman's life may be made miserable and cohabitation with her husband made unbearable by other means than the inflicting by him of blows upon her person; and while in this case there is not great violence often repeated shown by appellant toward appellee, there is evidence of coarse and brutal conduct and also instances of physical violence.

Appellant was jealous of appellee, and his conduct toward her implied a belief on his part that she was not faithful to him, and the repeated efforts of the chancellor to bring the parties together and have them live as husband and wife was defeated by appellant's alleged doubt of her chastity and his refusal to be reconciled until he had an opportunity to investigate as to rumors that had reached him. This condition of mind on his part gave color and sting to his conduct toward her, and might render actions and words, which would otherwise be indifferent, cruel in the extreme. We can not say, therefore, that the court erred in its conclusion, and while we think the allowances made for alimony and solicitor's fees "full liberal," we are not disposed, in view of all the circumstances, to regard the action of the chancellor in those respects as constituting ground of error. The decree will be affirmed.

Decree affirmed.

CHARLES DRABEK ET AL.

V.

GRAND LODGE OF THE BOHEMIAN SLAVONIAN BENEVO-
LOENT SOCIETY.

*Fraud—Action against Surety on Bond of the Secretary of a Secret So-
ciety—Evidence—Admissions of Principal, Since Deceased—Collateral
Evidence—Letter—Fraud.*

24	82
51	577
24	82
99	1187

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1. It is fraud in law, if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad.

2. Under the rule that the evidence must correspond with the allegations and be confined to the point in issue, all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact in dispute, is inadmissible.

3. In an action against the sureties on the bond of the secretary of a secret society, it is *held*: That certain admissions by the principal on the bond, although made subsequently to the acts to which they relate, were properly admitted to charge the defendants, such admissions being against the interest of the principal and he having since died; that a letter of the principal containing collateral matters, written in extenuation of his conduct, was improperly admitted; and that, if said principal on said bond was a defaulter at the close of his previous term of office, and the president of said society, with knowledge of such fact, falsely represented to the defendants that his accounts were correct, and thereby induced them to deliver the bond in question, it is void and will not sustain the action.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

This was debt by appellee, as plaintiff below, brought against appellants, as defendants, upon a bond made February 14, 1885, by one John A. Schleiss, as principal, who had been elected to the office of grand secretary of plaintiff for the term of one year, and by the defendants as sureties, in the penal sum of \$8,000, conditioned for the faithful performance by said Schleiss of the duties of said office and that he would deliver all property, books, papers and money belonging to the plaintiff, which he might have in his possession, to his successor in office, or to such person or persons as the plaintiff or its authorized officers might at any time direct. The breach assigned was, that divers sums of money belonging to plaintiff, amounting to \$8,000, came to his hands as such secretary, which he, said Schleiss, converted and disposed of to his own use, and refused to pay over to plaintiff, or his successor in office, etc., although requested so to do.

Schleiss having died before suit brought, the action was against the sureties alone, and they pleaded traversing the

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breach, *non est factum*, and several special pleas, one of which was the plea, in substance, that said Schleiss had held said office for the next preceding term of one year; that before the making and delivering of said bond the plaintiff by its officers falsely and fraudulently represented to defendants that said Schleiss had faithfully performed his duties as such secretary during his previous term of office, and had fully accounted for and paid over all moneys of plaintiff which had come to his hand during said year, as such secretary; averring that such representations were false at the time they were made, and known to the plaintiffs and its officers to be false and untrue when made; the said plaintiff and its officers well knowing that said Schleiss had converted to his own use and embezzled divers sums of money of plaintiff during said previous term of office; that defendants confiding in such representations and believing them to be true were induced to make and deliver said bond.

Issue was taken upon the averments of said plea by common traverse, and the case tried by jury, resulting in a verdict and judgment against the defendant, in the sum of \$8,000 debt and \$5,053.15 damages, and they appeal to this court.

On the trial the plaintiff gave in evidence the bond, and upon the question of breach assigned, the court allowed plaintiff under objection and exception of defendants to introduce in evidence a conversation had with Schleiss in August, 1885, after he had, by the action of the plaintiff, ceased to be in the service of the latter in any capacity, in which Schleiss admitted having received \$583 during his former terms and not accounted for; and also a letter written by him to the Lodge, August 18, 1885, after he had ceased to be in any wise in the services of plaintiff, which letter was read to the jury, and is as follows:

“J. A. SCHLEISS,
“*Notary Public and Conveyancer*,
“729 South Halsted St.

“CHICAGO, 18th day of Aug., 1885.

“HON. GRAND LODGE ILLINOIS, C. S. P. S.
(in place.)

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“The following I submit to you as a statement of my obligation to the Grand Lodge:

V. Misek.....	\$ 750.00	
J. Karasek.....	750.00	
Jos. Zak.....	750.00	
Jan. Sebek.....	750.00	
J. Wanzl, (Hanzl).....	750.00	
L. Navratil.....	750.00	
F. Weingartl.....	243.90	
K. Chobot	} In settlement with Wocel	285.35
Fr. Berounsky		
Upon ass't from 1st July received by me.....	691.50	
		<hr/>
Makes a total.....	\$5,720.75	
Carried over.....		\$5,720.75

PAID OUT BY ME OR WHAT IS TO MY
CREDIT.

V. Seyk, funeral of Misek.....	\$ 167.65	
J. Wanzl.....	377.65	
V. Straka, on account of death No. 31.	50.00	
Half year's salary.....	50.00	
Expenditure for stamps, etc.....	4.50	
From Lodge Ill. No. 91, debt for ass't of 1st day of July.....	17.80	\$ 667.60
		<hr/>
Remaining for G. L.		\$5,053.15

“On this occasion I can not omit to remark that this unfortunate affair happened by reason of great financial losses, but mainly on account of my serious illness, for I was unable to go among the people and thus the money lost itself from circulation. Had I been well, I guarantee that it would not have come to this, in spite of all the efforts of some of the brothers, who, knowing that a sick man can not defend himself, tried to ruin him in an assassin-like manner.

“Well, they were successful this time; not only have they brought me to the greatest want, but they have deprived my

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family of sustenance. Let them remember this well. The times change and as the saying is: "God deals out requitals!"

"To my honorable sureties I promise and assure them that each and every one will be promptly paid. I think, that already in May I will be able to apportion something, for by that time I hope to have together about \$3,000.00. Schleiss may be besmirched, but his character will show that he has a different heart than those who have been publicly proclaiming me a bankrupt a year ago already.

"Here was an opportunity to sue for \$10,000, but Schleiss did not do it. Let cowardice, gossip and Jesuitism flourish along. The world demands it!

"With all respect,
"[Signed] J. A. SCHLEISS."

The court excluded much evidence offered by the defendants in support of their defense of fraud, but notwithstanding such ruling, there was evidence tending to prove the knowingly making of the false representations set out in the plea deemed sufficient to go to the jury. At the instance of the plaintiff, the court instructed the jury upon the issue of fraud as follows:

"But upon the question of the defendants' liability the court further instructs you, that if you believe from the evidence that before the bond in question was delivered, the defendants or any person acting for them and in their behalf appointed for that purpose, applied to the president of the society at a meeting of the Lodge for information concerning the financial affairs of the secretary, Schleiss (Abs. 87), and whether his accounts with the society were all right; and further find from the evidence that in reply to such inquiry (if made) the president of the Lodge, *then and there intending to deceive*, wilfully and falsely replied that the accounts of said secretary Schleiss were all right and correct, and the defendants or the person acting for them, were reasonably deceived and misled thereby, and thereby induced to deliver the bond; and if the jury further find from the evidence that at the time such statements were made (if you find they were made) they were false and untrue, and that the said Schleiss was then a defaulter, and the president of said society had full knowledge of such

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fact (if you find such was the fact), but wilfully stated the contrary *for the purpose of deceiving the defendants, and to induce them to deliver the bond*, then and in such case the defendants would not be liable on said bond.”

Messrs. KRAUS, MAYER & BRACKETT, for appellants.

When persons about to become sureties on a bond seek information from the party for whose benefit the bond is to be given, as to the previous honesty of the principal in the bond, it is the duty of the beneficiary to impart truthful information, if any. A concealment or false statement as to the previous conduct of the principal, under such circumstances, will discharge the sureties from all liability. Brandt on Suretyship and Guaranty, Sec. 348; Booth v. Storrs, 75 Ill. 438; Roper v. Sangamon Lodge, 91 Ill. 518; Ham v. Grove, 34 Ind. 18; Atlas Bank v. Bronnell, 9 R. I. 168; Franklin Bank v. Stevens, 39 Me. 532; Bank v. Haskell, 51 N. H. 116; Graves v. Bank, 10 Bush, (Ky.) 23; Best v. Brown, 3 Gifford, 450; Wayne v. Bank, 52 Pa. St. 343, and cases cited.

The court below erred in admitting in evidence as against these sureties the personal letter of Schleiss, dated August 18, 1885, admitting his defaults, the same being written and sent along after the *res gestæ*, and after his removal or suspension from office. It was pure hearsay as against appellants; was obtained solely for use on this trial, and was the only evidence of Schleiss' defaults introduced in the whole case. Better evidence of Schleiss' affairs and transactions existed in his books of account in the hands of appellee. 1 Greenl., Ev., Sec. 187; Hatch v. Elkins, 65 N. Y. 489; Stetson v. City Bank, 2 Ohio St. 167, 175; Hotchkiss v. Lyon, 2 Blackf. 222; Shelby v. Governor, 2 Blackf. 289; Chelmsford Co. v. Demarest, 7 Gray, 1; Pollard v. R. R. Co., 7 Bush., 597; State v. Bird, 22 Mo. 470; Association v. Edwards, 47 Mo. 445.

The objections by appellants to this letter in the court below were:

1. Because it covered a defalcation not covered by the bond in suit.

2. It is not admissible against these sureties because made

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by a third party and being also an admission not a part of the *res gestæ*.

3. It is secondary evidence of the contents of Schleiss' books then in possession of said grand lodge.

Schleiss was absolutely suspended from office and all his functions as financial secretary were delegated to three other men before this letter of August 18, 1885, was written by him. See Greenl., Ev., Sec. 187.

The declaration or admission of the principal to bind the surety must in all cases be part of the *res gestæ* in reference to which the surety has covenanted, and that the principal's subsequent admissions, not a part of the *res gestæ*, do not bind, and are not competent as against the surety. Hatch v. Elkins, 65 N. Y. 489. See also Whitmarsh v. George, 8 B. & C. 556; Goss v. Watlington, 6 Moore, 355; Middleton v. Melton, 10 B. & C. 317; Hotchkiss v. Lyon, 2 Blackf. 222.

Messrs. JONES & LUSK, for appellee.

The record shows that the lodge did not suspend Schleiss but designated certain persons to perform his duties *pro tem*.

Schleiss was still in office and the preparation of the letter or report was clearly within the line of his duty. Whitmarsh v. George, 8 B. & C. 556; Middleton v. Melton, 10 B. & C. 317; U. S. v. Ganson, 19 Wall. 213; Pendleton v. Bk. of Ky., 1 T. B. Mon. 181.

It was an official act and binding upon the sureties. City of Chicago v. Gage, 95 Ill. 629; Bartlett v. Board of Education, 59 Ill. 369.

It was of the *res gestæ*. City of Chicago v. Gage, 95 Ill. 593, 628; U. S. v. Cutter, 2 Curtis, 629; Parker v. State, 8 Blackf. 295.

In none of the cases upon which appellants rely was the principal dead, whose admissions were sought to be proven, and in almost all of them that fact was alluded to in such a way as to make them good authorities for us in this case. See Stetson v. City Bank, 2 Ohio St. 179; Chelmsford v. Demarest, 7 Gray, 1; Smith v. Whittingham, 6 Car. & P. 78.

This class of declarations embraces not only entries in books

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but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared, or at a subsequent day. 1 Greenl., Ev., Sec. 147; Watkin v. Pierce, 21 Gratt. 722; White v. Choteau, 10 Barb. 202.

“Nor does it seem necessary that the declaration should have been made by persons in the course of any business or employment, or that declarations against interest should be contemporaneous with the facts to which they relate.” 1 Phil., Ev., 248–277.

MCALLISTER, J. If Schleiss, the principal in the bond, was, at the close of his first term as secretary, a defaulter in his capacity as such officer, as respected a material amount of the funds of plaintiff below, as seems to have been the fact, and if such fact was known to plaintiff's president before, and at the time of the delivery by the defendants of the bond in suit, but unknown to the defendants, or any of them, and the latter, before they would deliver said bond, made or caused to be made inquiries of said president, or in open lodge, in his presence and hearing, for information respecting the condition of the accounts or financial relations with the plaintiff of said Schleiss as such officer, and if the fact of such defalcation was fraudulently concealed from them by the said president, or other agent of plaintiff, acting within the scope of his apparent authority, and having knowledge of such defalcation, or they falsely represented to the defendants that said accounts of said Schleiss were all right and correct, and thereby induced them to deliver said bond to plaintiff, then the same would be void and no recovery could be had upon it. Smith v. The Bank of Scotland, 1 Dow. 272, 292 *et seq.*; Railton v. Matthews, 10 Cl. & Fin. 934; Lee v. Jones, 17 C. B. N. S. 482; Wayne v. Commercial Nat. Bank, 52 Pa. St. 250; Franklin Bank v. Cooper, 36 Me. 180; S. C., 39 Me. 542; Sovy ads. The State, 39 N. J. L. 132; Roper v. Sangamon Lodge, etc., 91 Ill. 518.

Now, by the instruction to the jury upon the issue of fraud, given at the instance of the plaintiff below, the court aug-

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mented the burden of proof to which the defendants were subject under that issue, beyond what the law required, by directing them that it was incumbent upon defendants to show, in addition to the knowingly false representations, that they were made with the intention to deceive the defendants, and with the purpose of deceiving them and inducing them to deliver the bond.

The instruction was erroneous and misleading. It is fraud in law, if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may have not been bad. Fraud will be inferred. Case v. Ayers, 65 Ill. 142; McBean v. Fox, 1 Ill. App. 177; Gough v. St. John, 16 Wend. 645; Railton v. Matthews, 10 Cl. & Fin. *supra*.

The error of that instruction clearly requires a reversal of the judgment. But there is another important question which will arise upon another trial, and which we can not, with propriety, avoid passing upon, viz.: The admission in evidence under the objection and exception of the defendants, of a conversation with Schleiss, and the letter written by him August 18, 1885, set out in our statement of the case, after he had been dismissed and ceased to be in the service of the plaintiff in any capacity. The statements made by him in neither the conversation nor the letter can be considered as part of any *res gestæ*; and the question being considered independently of the circumstance of his being dead, we think it clear, upon principle and authority, that the evidence was incompetent as being mere hearsay.

In speaking of the admissions of a principal as evidence against a surety upon his collateral undertaking, Greenleaf says: "In the cases on this subject, the main inquiry has been whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they have been held admissible; otherwise not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done, and therefore is entitled to proof of his conduct by original evidence where it can be had,

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excluding all declarations of the principal made subsequent to the act to which they relate, and out of the course of his official duty." 1 Greenleaf on Evidence, Sec. 187.

The correctness of the rules, with their qualifications as embodied in the above quotation, has been recognized and illustrated by some of the ablest courts in the country. Stetson v. City Bank, 2 Ohio St. 167, opinion by Ranney, J.; Hatch v. Elkins, 65 N. Y. 489; Union Savings Association v. Edwards, 47 Mo. 445; Chelmsford Co. v. Demarest, 7 Gray, 1.

But it is insisted in argument on behalf of plaintiff below that the admissions and declarations of Schleiss were receivable in evidence under the rule as to the declarations and entries of persons since deceased, made against their interest, being competent evidence; and the cases of Whitmarsh v. George, 8 Barn. & C. 556, and Middleton v. Melton, 10 Barn. & C. 316, are cited in support of the doctrine.

We are inclined to the opinion that the admission of Schleiss in conversation, of having received a specific sum during the business of his office, and he having since died, was competent. 1 Greenleaf on Ev. (May's Ed.) Secs. 151, 152, and authorities cited in notes; but that the admission of his letter of August 18, 1855, was not competent. The letter contains statements of amounts received by him; and then several statements of matters not relevant to any point in issue. The whole letter was given in evidence by the plaintiff under objections and exception by defendants. One of the rules as to the production of evidence is, that it must correspond with the allegations and be confined to the point in issue. "This rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the persons from the point in issue, and to excite prejudice and mislead them." 1 Greenleaf on Ev., Sec. 52.

The assurance in the letter that his sureties would not suffer on his account, was well calculated to mislead the minds of the jurors. The plaintiff could, under no rule of law we are aware of, have given original evidence tending to prove that

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there was a probability that the defendants might reimburse themselves if they had to pay the amount in question. *Leach v. Nichols*, 55 Ill. 273.

Besides, it is clear from reading the letter, that all the collateral matters adverted to and embraced in it, and which were received in evidence, are to be put upon the same footing of irrelevancy, and proceeded from motives of self-interest on the part of the writer. They were written in extenuation of his conduct, and not against his interest. We are well aware that some courts have held that where part of the entries or declarations are against the pecuniary or proprietary interest of the declarant, that would carry the whole. But we have been cited to and we can find no authority, which would authorize the introduction of such collateral matters when the party producing them would not be authorized to give original evidence of the same on account of their irrelevancy and mischievous tendency.

The judgment below should be reversed and the cause remanded.

Reversed and remanded.

 PHILIP LICHTENSTADT

V.

BENJAMIN W. FLEISHER ET AL.

Injunctions—Dissolution—Damages—Suggestion of—Measure of—Solicitor's Fees—Discretion of Court.

1. Where an injunction has been dissolved, the damages to be allowed in the assessment upon a suggestion of damages, are only such as have resulted from the improper suing out of the injunction. Solicitor's fees must be confined to the proper allowance for services rendered on the motion to dissolve.

2. The allowance of solicitor's fees in such cases rests somewhat in the discretion of the chancellor before whom the litigation has proceeded, and unless he has very clearly gone wrong, his discretion will not be interfered with by this court.

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3. In such a case this court will not reverse merely for the reason that the finding of the court below was for a less sum than the lowest amount fixed by the witnesses.

[Opinion filed November 23, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

Mr. ALLAN C. STORY, for appellant.

In November, 1884, a bill in chancery was filed in the Superior Court against appellant and others, to enjoin them from preparing for trial or trying a certain replevin suit which had been brought, for a quantity of woolen yarn, sworn by plaintiffs to be worth \$5,000, and which they had obtained from Lichtenstadt on the writ, and shipped to Philadelphia before filing the bill. They also claimed in the bill for an injunction a quantity of other yarn, claimed to be worth in all from \$8,000 to \$9,000.

The writ was served just as the replevin case was to be called for trial, and of course the attorney's fees for this and other expenses of preparation for trial in the case, was an element of damage to appellant by reason of the injunction.

Several attempts were made to dissolve the injunction, and complainants were twice allowed to amend their bill. Finally, after answer, a new injunction bond was ordered, and finally on the third motion the injunction was modified, so as to allow all steps to be taken in replevin suit except to try the same.

The chancery cause was tried upon bill, answer, replication and proofs, consuming five days in the trial. The court, Judge Garnett, dismissed the bill for want of equity at cost of complainant, and suggestions having been filed, assessed damages upon dissolution of injunction at \$150 in favor of appellant.

Under the previous decisions of the Supreme Court and this court there should have been allowed a sum at least twice as large as the judgment appealed from. *Joslyn v. Dickerson*, 71 Ill. 25; *Mason v. City of Shawneetown*, 77 Ill. 538; *Hartwell v. Black*, 48 Ill. 301; *School Directors v. Trustees*, 66 Ill. 247.

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Mr. JULIUS STERN, for appellees.

Per Curiam. This is an appeal from the finding and judgment rendered by the chancellor upon a suggestion of damages on the dissolution of an injunction. The injunction was dissolved on final hearing, and much of the work done by counsel for which recompense was sought, was upon the merits and was necessary, and presumably would be valuable to appellant in the suit at law, to enjoin the prosecution of which the bill in chancery was filed. The only damages claimed was for attorney's fees.

While the testimony introduced would warrant the court in allowing a large amount, we are unable to say that the court so far erred in fixing the amount for which judgment was rendered as to require us to reverse the judgment.

The damages to be allowed in such assessments are only such as result from an improper suing out of the injunction, and the solicitor's fees must be confined to the proper allowance for services rendered in the motion to dissolve. The allowance of such fees rests somewhat in the discretion of the chancellor before whom the litigation has proceeded, and the discrimination made by him between the services to be charged to the motion to dissolve and those to be referred to the trial of the entire case presents a difficult question for a reviewing court, and unless, therefore, he has very clearly gone wrong, his discretion will not be interfered with.

We find no case in which the judgment of the chancellor has in such case been set aside on the ground that the allowance of attorney's fees was, under the evidence, too small, and in view of the opinions of the value of the services which are usually given by lawyers who are called as witnesses to prove the value of such services, we are loth to set a precedent. We can not reverse in such a case for the reason that the finding of the court is for a less sum than the lowest amount fixed by witnesses.

The judgment must be affirmed.

Judgment affirmed.

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WM. A. PAULSEN AND FLORA A. BROWN
V.
CHARLES MANSKE ET AL.

Mechanic's Lien—Contracts—Whether with Owners—Agency—Evidence—Admissions—Release—Waiver—Arbitration—Revocation.

1. Upon a petition for a mechanic's lien, it is *held*: That the contracts under which the petitioners furnished labor and materials were made with the owners of the land by one who, though acting in his own name, was authorized to act and was in fact acting, not only for himself but as their agent; that certain admissions by the beneficial owner, contained in an agreement submitting the matters in dispute to arbitration, are competent evidence tending to establish the agency, and as such sufficient to sustain the decree for the petitioners; that a release given by the petitioners to a mortgagee is not available to the owners as a waiver of the liens in question; and that said liens were not affected by the agreement to submit to arbitration, the commencement of this suit having been a revocation of the agreement to arbitrate.

2. Either party to a submission, may, at any time before an award, revoke the authority of the arbitrators. The institution of a suit before award by one of the parties, the cause of action being the same subject-matter, revokes by implication the agreement to arbitrate.

[Opinion filed November 23, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. CYRUS EPLER, Judge, presiding.

This was a petition filed by Charles Manske against William A. Paulsen, Lewis A. Brown, Flora A. Brown, August Zander, Otto Schmidt and Henry Sierks, for a mechanics' lien. The petition alleges that on the 23d day of October, 1884, the defendant Lewis A. Brown was the owner of the legal title, in trust for defendant, Flora A. Brown, of a certain lot on the northwest corner of Stone and Scott Streets, Chicago, having a frontage of 130 feet on Scott Street and forty-three and sixty-one one-hundredths feet on Stone Street; that on that day Lewis A. Brown and Flora A. Brown entered

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into a written contract with Paulsen, thereby appointing him their attorney in fact, to contract for the erection of certain buildings on said lot, and to charge, obligate and bind them to pay for the same; that either in and by said power of attorney or some other contract between him and them, Paulsen was vested with some equitable interest in said premises, the precise nature of which was unknown to the petitioner; that October 23, 1884, the Browns and Paulsen entered into a contract with the petitioner by which the petitioner contracted to furnish the materials and do the cut-stone work in said buildings for \$9,900, payable from time to time as the work progressed; that said contract, though signed by Paulsen only, was in fact executed by him not only in his own behalf but in behalf of the Browns, and was binding in equity on them as well as on him; that the petitioner performed his contract according to its terms, and completed the same May 25, 1885, and that after deducting all payments, there remained due him the sum of \$3,000.75, with interest from May 25, 1885; that the other defendants had or claimed some interest in the premises, but that such claims were subsequent and junior to the petitioner's lien.

Defendants Zander, Schmidt and Sierks, each filed an answer and cross-petition, admitting the allegations of the original petition as to the ownership of the premises, the contract between the Browns and Paulsen and Paulsen's equitable interest, and each setting up a contract with the Browns and Paulsen to furnish certain materials and do certain portions of the work in the construction of said buildings, and alleging the performance of such contracts; that certain sums remained due thereon, and praying for a lien on the premises therefor.

The Browns and Paulsen answered, admitting that Lewis A. Brown was seized in fee of said premises for the use of Flora A. Brown, and admitting that there was a contract between the Browns and Paulsen concerning the anticipated erection of said buildings, but denying that Paulsen was the agent of the Browns, alleging that Paulsen, when contracting with the petitioner and with the defendants, Zander, Schmidt and Sierks, did not act as the agent of the Browns, and that they were not

liable on such contracts; that all of said parties had entered into an agreement for an arbitration of the matters in dispute between them, and that said arbitration proceedings had not reached a conclusion, their failure so to do being in no way attributable to the Browns and Paulsen, and that such submission to arbitration was a waiver on the part of the petitioners of their liens on said premises. The answer also alleged that the petitioners in the original and cross-petitions had executed and delivered to one of the defendants answering, an explicit waiver in writing of any liens which they might have upon said premises for any work or materials put upon the same.

At the hearing, which was had on pleadings and proofs, the petitioners gave in evidence two contracts executed by Lewis A. Brown and Flora A. Brown of the first part, and William A. Paulsen of the second part, under their respective hands and seals, and both bearing date October 1, 1884. By one of said contracts the party of the first part covenanted and agreed to convey to the party of the second part, in fee, clear of all incumbrances, by a good and sufficient warranty deed, the west ninety-five feet of said lot, being all of the lot except the east thirty-five feet, "upon which a double house is to be erected, according to an agreement of even date herewith, and which is hereby made a part of this contract," and the party of the second part agreed to pay the party of the first part for the portion of the lot so to be conveyed, the sum of \$5,846, by building said double house upon said thirty-five feet of said lot.

By the other contract it was agreed, in consideration of the contract above described, that the party of the second part should build a row or block of houses on said lot, according to certain plans and specifications, making the house on the east thirty-five feet a double house, and said contract then proceeded as follows:

"It is further agreed hereby, that said first parties shall execute any notes, trust deeds, mortgages or any documents that may be necessary for the purpose of borrowing money on said lot with which to erect said block of buildings, agreeing that all moneys so borrowed shall be used by said first parties for

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paying for said buildings, to be paid, however, only on orders or architect's certificates, endorsed by said second party, meaning hereby, that said first party shall control all the money expended on said buildings, but that said second party shall have entire control of the work, and, by his orders, of the payment of contractors.

"It is further agreed, that when said block is finished according to said plans, said first parties shall estimate the cost of the east house of said block, according to the vouchers and certificates of cost for the same, and credit said second party with the amount so ascertained, and if said amount be more than the purchase money named in the contract for a deed above mentioned, said first parties will execute the deed therein named, and assume so much of the mortgage debt on said lot and the buildings thereon, as the cost of said east house exceeds the amount of said purchase money; but if the cost of said east house as above be less than said purchase money, then the second party shall pay the difference in cash, or secure said first parties for any amount that may appear due, and when all of said purchase money shall have been paid, then the deed shall be executed according to the contract for a deed hereinbefore mentioned.

"It is hereby understood to be the meaning and intention of the parties hereto, that the second party is to have and to enjoy any profits that may arise or grow out of the performance of this contract or the contract for a warranty deed hereinbefore mentioned, and to control the property in every way until all the provisions of both contracts are performed; and that the second party will furnish the vouchers and architect's certificates to the first parties for the payment of moneys and upon which to estimate the cost of said east house. In case of dispute as to said cost, each party hereto shall choose an appraiser, and the two chosen shall name a third, and the three shall finally decide said cost; and said first parties are to have the said east house at its cost as aforesaid, and they shall execute a deed for the land as soon as said land is fully paid for, either by the money said first parties find has been expended in the building on the part of the lot reserved by them, or paid for in any other manner by said second party."

Manske, Zander and Schmidt produced in evidence contracts in writing for the labor and materials which they respectively claim to have furnished for said buildings. Upon their face these contracts purport to be between them and Paulsen individually, and they are signed by Paulsen alone. Sierks proved a verbal contract with Paulsen under which he, as architect, drew the plans and specifications, and superintended the erection of said buildings. Each of said parties gave evidence tending to show the performance by each of his contract, and also showing the balance due them respectively.

To obtain money to erect said buildings, the Browns obtained a loan of \$22,000 from the United States Mortgage Company, and executed to said company a mortgage on said premises for that amount. Of the money thus borrowed, \$15,000 was paid over by the agent of the mortgage company to the Browns during the progress of the work. It appearing that the petitioners and others were claiming mechanics' liens on said premises, the agent of the mortgage company refused to pay over the remaining \$7,000 unless matters should be so arranged as to give said company priority over said liens. At the same time various disputes having arisen between Flora A. Brown, to whom the legal title to said lot had in the meantime been conveyed by Lewis A. Brown and Paulsen, of the one part, and said mechanics and material men of the other, an agreement was entered into between them, under their respective hands and seals, bearing date August 17, 1885, submitting said differences to arbitration. Said agreement was executed by Mrs. Brown, Paulsen, the petitioners and others, and recited that: "Whereas, the said William A. Paulsen, on his behalf, and on behalf of Flora A. Brown, did, several months ago, in the erection of certain buildings on (the premises in question), enter into written contracts" with Manske, Zander, Schmidt and various others (setting out the substance of said contracts), and it was claimed by all of said contractors that they had fully performed their contracts, and that there was due them various sums particularly specified; and, "Whereas, said Paulsen, on his own behalf and on behalf of said Flora A. Brown, entered into a verbal contract with Charles Thielemann, for the furnish-

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ing of the galvanized iron cornice work in and about the erection of said buildings," etc.; and, "Whereas, said Paulsen, on his own behalf and on behalf of said Flora A. Brown, as aforesaid, at the commencement, employed said Henry Sierks as architect, to superintend the erection of said buildings, and to exercise all necessary control for the purpose of securing a strict performance on the part of said several contractors of the terms of said contracts," etc.; and, "Whereas, it is claimed by said Paulsen, on behalf of the said party of the first part, that said contractors, or some of them, have not furnished material, and have not performed their work as they were required to do by the terms of said contracts," etc.; and, "Whereas, all of said parties to this agreement are desirous of avoiding litigation, and determining their disputes in as speedy a manner as possible, so as to secure the prompt payment on the part of said party of the first part, of all claims due the contractors, as well as a proper admeasurement and adjustment of all damages to said Paulsen, if any shall appear to exist. Now, therefore, in view of the premises, the parties to this agreement have decided to submit to an arbitration of all differences existing between them."

The agreement then recited that Mrs. Brown and Paulsen, the parties of the first part, had appointed one Newman, and the contractors and architect, one Dryer, as arbitrators, who were to select a third arbitrator to act with them. Then, after directing the mode of procedure by the arbitrators and the form of their award, and providing that such award might be entered in the Circuit Court of Cook County as a final judgment and determination of that court, it contained the following stipulation: "It is hereby stipulated and agreed by said contractors and the architect, that, so far as their claims for mechanics' liens against said premises are concerned, the United States Mortgage Company, a corporation, has a lien prior and superior to theirs by virtue of said mortgage, made, acknowledged and delivered to said corporation by Lewis A. and Flora A. Brown, the owners of the land on which said buildings are erected, under date of December 31, 1884, and conveying said premises for the purposes of securing an indebtedness of \$22,000."

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The stipulation in regard to the lien of the mortgage company, contained in the foregoing agreement, not proving satisfactory to the agent of said company, the architect and mechanics, after considerable negotiation among the parties, executed and delivered to said agent the following instrument:

“We, the undersigned, contractors for the buildings erected by Flora A. Brown and William A. Paulsen, on the premises described as lot 1, block 6, in Stone’s subdivision of Astor’s addition to Chicago, hereby waive and relinquish all and every right to a mechanic’s lien under the statute, for work done and materials furnished on said premises, and particularly our priority of claim so far as the United States Mortgage Company is concerned.

“Chicago, August 26, 1885.”

This waiver was signed by Zander, Schmidt, Sierks, Manske and various other mechanics and material men. Upon the delivery of said waiver to the agent of the mortgage company, said agent paid over to Mrs. Brown the remaining \$7,000 of the loan.

It appears that the arbitrators appointed by the parties were unable to agree upon a third arbitrator. A stipulation was thereupon entered into authorizing the appointment of such third arbitrator by the Circuit Court, but before that was done, Dryer, the arbitrator selected by the mechanics, became sick and went to Europe. An attempt was then made to obtain Paulsen’s consent to the substitution by the mechanics of another arbitrator in his place, and such consent being refused, this suit was brought.

The court, by its decree, found the petitioners entitled to liens on said premises for the several amounts remaining due them on their respective contracts, and ordered Mrs. Brown and Paulsen to pay the same within five days, or in default of such payment, that said premises be sold.

Messrs. EDWARD J. JUDD and A. M. PENCE, for appellants.

The contracts in this case were made with one not the owner of the land, and so no lien can exist in favor of the contractors. *Woodburn v. Gifford*, 66 Ill. 285; *Wetherill v. Ohlendorf*, 61 Ill. 283. The owners of the land in this case,

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the Browns, contracted with Paulsen to erect certain buildings, and he in turn entered into personal contracts with the lien claimants in this cause. Their position is that of subcontractors, and they are entitled to no lien, as they have given no notices to the owners as required by statute. The taking of other security is a waiver of the lien. *Benneson v. Thayer*, 23 Ill. 374; *Kinzey v. Thomas*, 28 Ill. 502. The lien claimants in this cause contracted with Paulsen individually, and subsequently entered into articles of arbitration in which Flora A. Brown joined, making herself liable for any award which might be rendered. This constitutes a waiver of the lien, if any existed.

Messrs. VOCKE & STORCK, for appellees.

As a general rule an equitable as well as a legal owner of property may create a mechanics' lien. *Phillips on Mechanics' Liens*, Sec. 66.

The word "owner" includes owner in equity as well as at law. *Atkins v. Little*, 17 Minn. 353; *Rollins v. Cross*, 45 N. Y. 768.

Parties having contracted for the purchase of property, and entered into possession, will, so far as their equitable interests are concerned, be regarded as owners. *Phillips on Mechanics' Liens*, Sec. 69; *Stockwell v. Carpenter*, 27 Iowa, 119.

The interest of the owner may be a fee simple, an estate for life, or it may be any estate less than a fee. *Tracy v. Rogers*, 69 Ill. 662.

The fact that a person acted as an agent may be shown, although he signed the contract in his own name. *Whitlock v. Hicks*, 75 Ill. 460.

The liability of the principal to third persons upon contracts made by his agent, within the scope of his authority, is not varied by the mere fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit is given to the agent. *Story on Agency* (7th Ed.), Sec. 446.

The release given to the contractors is inoperative as to appellants. The release was executed on the faith of the prom-

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ise to enter into arbitration, and unless that agreement has been performed appellants should not be permitted to claim any benefits under the release.

The release is unquestionably operative as to the mortgage company, but it has no force or operation at all in favor of appellants. Upon what consideration is it founded as to them? Their revocable and unenforceable agreement to submit the matters in controversy to arbitration is certainly not a good or valuable consideration, unless the agreement was carried out. Afterward made, we make no question but what the lien would be gone, but the mere execution of an agreement to do something in the future, and which can not be enforced, ought not to operate to deprive contractors of their lien for work done under the statute.

BAILEY, J. It is urged that the decree in this case, establishing mechanics' liens upon the premises in question, should be reversed on the ground that the contracts under which the petitioners furnished labor and materials were not made with the owners of the land. At the time said contracts were entered into, the legal title to the lot on which the buildings in question were to be erected stood in Lewis A. Brown, said title being held by him in trust for Flora A. Brown. They, being the owners of the premises, entered into a contract with Paulsen, which provided for the erection on said lot of a block of buildings. In erecting said buildings the Browns were to provide the necessary money by mortgaging the lot, and were to keep said money in their own hands, and to pay it out for labor and materials on architects' certificates indorsed by Paulsen. Paulsen was to take possession of the lot, make the contracts, see that the labor and materials were provided, have the oversight of the work, and, in general, attend to all business matters incident to the erection of the buildings. When the buildings were completed, the Browns were to deed to Paulsen the west ninety-five feet of the lot for \$5,846, and the same with the buildings thereon were to belong to him, subject to the mortgage given to raise the money necessary to defray the cost of the buildings, said purchase money to be paid by erecting and turning over to the

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Browns a building on the east thirty-five feet of the lot, costing that sum, the Browns to assume only so much of said mortgage as the cost of the building on the east thirty-five feet should exceed said sum of \$5,846.

Under this arrangement Paulsen let the contracts for the erection of the buildings in his own name; and the decree can not be sustained only on the theory that he was acting, and was authorized to act, not only for himself, but also on behalf of and as the agent of the Browns. The scheme upon which the buildings were erected was somewhat peculiar, and it is not easy to define the exact legal relations established between the Browns and Paulsen by their contract. But we are unable to see anything in those relations which necessarily excludes the theory that, in entering into the various contracts for labor and materials, though acting in his own name, he was authorized to act, and was in fact acting, not only for himself, but as the agent of the Browns, or, at least, as the agent of Mrs. Brown, the beneficial owner of the lot.

In the agreement executed by Mrs. Brown, Paulsen and the petitioners, submitting the matters in dispute between them to arbitration, admissions are made by Mrs. Brown in a very full and ample manner, that in making all of said contracts, Paulsen acted on her behalf as well as for himself. These admissions are competent evidence tending to establish Paulsen's agency, and are, in our opinion, so far as this point is concerned, sufficient to sustain the decree.

Again, it is urged that the petitioners have waived their liens, and that the decree for that reason can not be sustained. The instrument relied upon as a waiver or release names no releasee and expresses no consideration, and we have therefore to look to extrinsic evidence to ascertain both the consideration and the party in whose favor the waiver or release was intended to be executed. The reason for giving the release was that the agent of the mortgage company declined to pay over \$7,000 of the money loaned on said mortgage unless the liens claimed by the mechanics and material men should be so arranged as to leave the mortgage the first lien on the premises. The consideration of the instrument was the consent of the mortgage company to pay over said money so as to make

it available for the satisfaction, *pro tanto*, of the claims of the mechanics and material men. Not only did the consideration emanate from the mortgage company, but the instrument, on being executed, was delivered to said company. The legal conclusion from these circumstances is that the mortgage company and that company alone was the party in whose favor the release was intended to be executed. That seems to us to be as clearly shown as though the name of the mortgage company had been inserted in the instrument as releasee.

The release, being given to the mortgage company, is available for that company alone. It was not executed to Mrs. Brown or to Paulsen, or upon any consideration moving from them. So far as appears they are mere strangers to the instrument, and we know of no principle upon which they can be permitted to avail themselves of its benefits.

We are of the opinion that the petitioners' liens were in no way affected by the agreement to submit the differences between the parties to arbitration. Had the submission been followed by an award, the rights of the parties would undoubtedly have been conclusively determined. It is a general rule, however, that any person who is a party to a submission may, at any time before an award made, revoke the authority of the arbitrators; and for this purpose it makes no difference whether the submission is by deed or by parol. Morse on Arbitration, 230, and authorities cited. Such revocation may be express or it may be implied; and the institution of a suit by one party against another, after the submission has been entered into and before the award has been made, the cause of action being the subject-matter of the arbitration, will operate to revoke, by implication, the agreement to arbitrate. *Peter's Administrator v. Craig*, 6 Dana, 307; Morse on Arbitration, 236.

The institution by the petitioners of the present suit was, in law, a revocation of the agreement to arbitrate, and after such revocation, the rights of the parties were no longer subject to or affected by the agreement.

We are of the opinion that none of the errors assigned by the appellants should be sustained, and the decree will therefore be affirmed.

Decree affirmed.

Holden v. Holden.

NEWTON P. HOLDEN
v.
CHARLES C. P. HOLDEN ET AL.

Equity Jurisdiction—Real Property—Bill to Quiet Title—Possession—Contract of Sale—Whether a Mortgage—Default—Demurrer to Bill—Motion—Prayer—Wrong Relief—General Relief.

1. The general rule that a court of equity has no jurisdiction to quiet title or remove a cloud upon the title to real estate unless the complainant is in possession, or the land is improved or unoccupied, has certain exceptions.

2. Where the facts stated in the bill show that the legal title claimed by the complainant is not disputed by the defendant in possession, but that such defendant sets up some equity, not affecting the legal right of possession, which operates as a cloud on the legal title and prevents a sale of the property, equity has jurisdiction, there being no adequate remedy at law.

3. A court of equity has jurisdiction where the defendant is in possession of real estate and in default under a contract for purchase.

4. Under the general prayer for relief a court of equity may grant the relief appropriate to the facts, although the bill was framed with a view to getting a different relief.

5. Where there is a prayer for general relief, it is improper to grant a motion, which is in effect a demurrer to the bill, on the ground that the complainant has prayed for wrong relief.

[Opinion filed December 7, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Appellant filed this bill in chancery in the Superior Court of Cook County, as follows:

Complainant, Newton P. Holden, of Frankfort, Will County, Illinois, represents,

That on or about March 1, 1881, complainant became the owner in fee simple of the premises in question by virtue of the warranty deed, dated March 1, 1881, from Eliza W. Roach to Newton P. Holden. Consideration, \$5,500. Conveying the property in dispute in this case. Acknowledged March 1, 1881. Recorded April 13, 1881, book 1074, page 132.

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That said premises consisted, at the date of said conveyance, and still consist, of a lot of land and a brick dwelling house and frame barn, and was in the occupancy of the defendant Holden.

That an agreement in writing was entered into, by and between complainant and defendant Holden, at or about the time of said conveyance, which is as follows:

“This agreement, made the first day of March, A. D. 1881, between Newton P. Holden, of Frankfort Station, Illinois, party of the first part, and Charles C. P. Holden, of Chicago, Illinois, party of the second part, witnesseth as follows:

“Whereas, Newton P. Holden, party of the first part, is the owner in fee of the premises known as No. 20 Aberdeen St., being the S. 20 ft. of lot 32 in blk. 1 of the C. T. sub. div. of blk. 1, W. $\frac{1}{2}$ and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, Sec. 17, T. 39, R. 14, E. of the 3rd P. M., in the City of Chicago; and whereas Charles C. P. Holden, party of the second part, is now occupying and residing in said premises.

“Now, therefore, Newton P. Holden, party of the first part, in consideration of the covenants and agreements made by the party of the second part, and hereinafter mentioned, agrees:

“1st. Not to disturb said party of the second part in his possession of said premises for the space of three years from March 1st, A. D. 1881, provided always that the covenants and agreements made by the party of the second part, which are a part of this contract, are kept good.

“2d. Said party of the first part agrees that if, during the term of this contract, said party of the second part does not default in any of the covenants herein made by him, said party of the second part, or his assigns, can, at any time during the said three years, have the privilege of purchasing said premises from the party of the first part, upon the payment to him of five thousand five hundred dollars (\$5,500); and said party of the first part agrees to hold said premises three years from March 1st, 1881, provided there is no default in the covenants made herein by the party of the second part.

“C. C. P. Holden, party of the second part, in consideration of the occupancy of the aforesaid premises, and the right to

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purchase the same within three years from March 1st, A. D. 1881, subject to the following conditions, covenants and agrees:

“1st. To pay said Newton P. Holden, party of the first part, interest on five thousand five hundred dollars (\$5,500), at the rate of seven per cent. per annum, payable semi-annually, at the end of each and every six months, from March 1st, A. D. 1881.

“2d. He, said C. C. P. Holden, party of the second part, further agrees to keep said premises, No. 20 Aberdeen Street, in good repair and insured for at least \$3,000 during his possession of the same.

“3d. Said party of the second part further covenants and agrees to pay all taxes on said premises as the same shall become due, including water taxes.

“4th. It is understood and agreed by said C. C. P. Holden, party of the second part, that if default shall be made in any of the covenants and agreements by him above made, then this contract shall become null and void, but not otherwise.

“NEWTON P. HOLDEN, [SEAL.]

“CHARLES C. P. HOLDEN. [SEAL.]

“*Witnessed by*

“WRIGHT HOLDEN.”

That said agreement was written in duplicate, one copy being delivered to each of the parties, they having signed the same in execution.

That defendant Holden neglected and failed to keep and perform the covenants and agreements of said agreement, and made default therein as follows:

Said defendant Holden has not paid or caused to be paid to complainant the sum of \$5,500 mentioned in said agreement, nor any part thereof.

Said defendant Holden has not paid or caused to be paid to complainant the interest on the same, mentioned in said agreement, nor any other part thereof than the amount which accrued and became due for the two years expiring March 1, 1883.

Said defendant Holden has not kept said premises in good repair—on information and belief.

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Said defendant Holden has not kept said premises, nor any part thereof, insured for at least \$3,000; but complainant is informed and believes that said defendant has kept said premises, that is, the improvements thereof, insured in his own name, and with the loss made payable to complainant as a mortgagee. Complainant is informed and believes that such insurance is no sufficient indemnity, because the policies provide that the title of the party insured, if not the absolute fee, should be stated in such policies, or they should be void; and such policies contained no explanation of the condition of such title, but were issued as though the fee simple title was in defendant Holden, and not in complainant, and as though complainant, instead of being the owner in fee, subject to said agreement, was simply the owner of a mortgage thereon. Complainant declined to receive such policies under said agreement, and they are in the possession or control of the defendant Holden. That the last of the policies was issued in November, 1884, and on inquiry complainant was informed that up to March 23, 1885, the premiums for such policies had not been paid. By a clause in the policies, such state of facts rendered them not valid.

That defendant Holden has not paid all taxes on said premises as the same became due, including water taxes. Complainant is informed and believes that said premises, or some part thereof, have been sold for unpaid taxes thereon, which should have been paid by defendant Holden.

That complainant has fully performed the agreement on his part, and has suffered defendant Holden to remain in possession of said premises until the demand and institution of the proceedings for the possession thereof hereinafter mentioned.

That complainant was able and willing to sell the premises to the defendant Holden according to the terms of the agreement, during the three years from March 1, 1881, notwithstanding the default aforesaid; but the defendant Holden was either unable or unwilling to buy the same and make payment therefor during said three years, according to the terms of said agreement, and requested that the complainant delay insisting upon the purchase or possession at the expiration of the three

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years. That on or about March 1, 1884, complainant demanded of said defendant that he comply with the terms of said agreement or surrender the possession to complainant, whereupon defendant Holden asked a delay until May 1, 1884, and complainant did delay in the enforcement of such demand until May 1, 1884. On or about said last named day defendant Holden requested further delay, and from time to time has requested delay after delay, until the matter became unpleasant to both complainant and defendant Holden—to complainant, because his property was fast being used up by defendant Holden, and to defendant Holden, because he either would not or could not do his duty in the premises—until, on March 6, 1885, defendant Holden verbally abused complainant, and refused to talk with him concerning the property; and then complainant caused demand for possession to be served upon defendant Holden.

That according to information furnished to complainant by defendant Holden, defendant Holden owns the furniture in said premises, and during all the time since the making of said agreement, he has rented said house and furniture, and has received as rent thereof his own board, and until recently, the board of his adopted daughter, and in addition the rent of \$50 per month.

That if defendant Holden had applied such rent in making the payments required by such contract, no such state of affairs would exist as is now the result from defaults of said defendant.

Complainant charges that if the representations of defendant Holden as to the revenue derived from the property are true, he has acted wrongfully and in bad faith in making default in the payment of taxes and interest.

Complainant avers that said premises are now occupied by defendant Hiltabidel and defendant Holden under some arrangement, the terms of which are unknown to complainant, but by virtue of which defendant Hiltabidel pays to defendant Holden a rental of \$50 per month, besides his board. That defendant Holden is not pecuniarily responsible, and has no means out of which his liability for the use and occupation of said premises

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can be realized. That complainant is entitled to the possession. That defendant Holden caused his duplicate of said agreement to be recorded on or about April 13, 1881, and the same is and constitutes a cloud upon complainant's title to the premises. That defendant Holden claims and asserts that he is owner of said premises, and that complainant is simply a mortgagee, which claim, complainant avers, is untrue and unfounded; but such claim, connected with said recorded agreement, constitute such a cloud upon and embarrassment to complainant's title, that complainant is thereby greatly damaged in his ownership of said property, and in justice and equity is entitled to the possession, and to be freed from the cloud.

That on March 7, 1885, complainant caused to be served on defendant Holden a demand in writing for the possession of said premises to which said defendant replied in a contemptible and ungentlemanly manner; and on March 9, 1885, complainant caused to be filed with Daniel Scully, a Justice of the Peace, a complaint in forcible detainer against defendant Holden, for the possession of said premises; that summons was issued and served, and cause came on for trial March 18, 1885. Defendant Holden was present, but declined to appear and defend. Cause was continued to March 19, 1885, at which time, and in the presence of defendant Holden, judgment was rendered in complainant's favor, and against defendant Holden, for the restitution of the premises and costs. That March 23, 1885, defendant Holden filed with the said Justice an appeal bond in \$400, and an appeal was perfected to the Circuit Court of Cook County. That the Circuit Court is so crowded with business that said cause can not be reached for trial for one or more years.

That said appeal is no adequate security. One of the sureties is G. M. Sayer, who, as complainant is informed, is a clerk in a wholesale store in the City of Chicago, and who recently married the adopted daughter of defendant Holden. Complainant is informed and believes that it was not claimed at the time of giving the bond that Sayer was sufficient. The other of the sureties is John Rosenberg, who purports to set forth his pecuniary responsibility and his qualifications as such

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surety in an affidavit on the back of the bond, in which he states that he is the owner of four lots in Ira Brown's subdivision, in said Cook County, and that they are incumbered not more than \$25.

That as a result of inquiries set on foot by complainant, it is apparent that the title of Rosenberg is not good as a basis of security. That said lots are from one to two miles southwest of Desplaines Station, in a locality where land is worth, as complainant is informed and believes, not to exceed \$75 per acre. That said lots are of such size that the twenty acres sub-divided are divided into 200 lots, besides streets and alleys. That said four lots are less than one-half acre in area. That Rosenberg's title, as appears by the records, is subject to two trust deed liens. The first is recorded in book 912, page 240, and secures \$800 and interest at eight per cent. from April 1, 1879. The principal matured April 1, 1882. Said trust deed conveys all of block 2, consisting of fifty lots, and contains a clause stating that said lots may be released upon the payment of \$19 and interest per lot, which makes, without interest, \$76 on said four lots. The other of said deeds is recorded in book 912, page 524, and secures \$673 and interest at eight per cent., which sum is long past due. This conveys ten lots in said block 2; and if the debt should be apportioned equally, the same is a lien upon said four lots of \$269.20, besides interest.

That the records show another incumbrance purporting to be a mortgage on lot 5, in said block 2, recorded June 6, 1884, from Michael J. Howard, a former owner of said lots, to Christoph Wilberheit; but complainant believes that the same was filed for record after Howard had parted with his title.

That complainant has caused diligent inquiry to be made concerning said lots, and is fully convinced that there is no security in the title which Rosenberg appears to have.

That at the time aforesaid, when complainant acquired the title aforesaid, there was in the possession of the grantor of complainant an abstract of title to said premises, which abstract is part and parcel of the property, and which was held and owned by the grantor with the property. That said abstract

is of particular value in connection with the ownership of the property, because of the destruction of the records of Cook County, October 9, 1871, and said abstract shows the title to such property as it existed prior to such destruction. That said abstract was delivered to complainant with said deed to him, and thereafter was in the custody, for complainant, of complainant's son, Wright Holden, now deceased. That defendant Holden procured said abstract from said Wright Holden, and now refuses to deliver the same to complainant, saying it is locked up in his safe and is going to stay there.

That said property is not worth to exceed \$7,000, and in the event that complainant should be deemed and taken to be simply a mortgagee thereof, the said value is not sufficient to pay the said sum of \$5,500 and the interest thereon at seven per cent. from March 1, 1883, and the amount necessary to free the property from liens for taxes which defendant Holden has not paid, and the usual expenses of a sale.

That actual loss will result to the complainant in any event, if defendants are allowed to remain in possession without making payment to complainant, or to a receiver, of a fair equivalent for the use and occupation.

Complainant is informed and believes that said premises are worth, as a fair rental, \$50 per month.

Complainant charges that defendant Holden ought to be restrained, by the order and injunction of this court, from collecting or receiving any money or rent for the use and occupation of said premises, or any part thereof, and from using and occupying the same without paying to complainant, or a receiver, such sum of money monthly as may be a fair sum for such use and occupation.

Complainant charges that said Anna Hiltabidel ought to be restrained from making payment of any money or rent for the use and occupation of said premises to any other person than the complainant, or a receiver, and from making any payment to defendant Holden, in respect to such use and occupation.

Prayer for answer, not under oath; that said agreement may be set aside and declared void; that complainant's title may be declared to be free and clear from any right, title or interest

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of the said C. C. P. Holden, and may be decreed to be free and clear of any cloud, claim or demand under and by virtue of said agreement; that the said duplicate thereof in the possession of defendant Holden may be delivered up to be canceled; that complainant may be put in possession of said premises; that defendant Holden may be decreed to pay to complainant what may be found due to complainant from defendant Holden for his use and occupation of said premises; that defendant Holden may be ordered and decreed to deliver the said abstract of title to complainant, or to a receiver; that defendant Holden may be restrained, by order and injunction of this court, from collecting or receiving any money or rent for the use and occupation of said premises, or any part thereof, and from using or occupying the same without paying to complainant or to a receiver, such sum of money, monthly, as may be a fair sum for such use and occupation, to be fixed by the court; that said Anna Hiltabidel may be restrained from making payment of any money or rent for the use and occupation of said premises, or any part thereof, to any other person than complainant or a receiver, and from making any payment to said C. C. P. Holden in respect to such use and occupation; that a receiver may be appointed with authority to take charge of the premises, to rent the same, and collect and receive rent, revenue and income thereof, and to disburse the same under the order and direction of this court, and with authority to keep the buildings insured in his own name as receiver, or otherwise, as may be right and proper, and with authority to free said property from tax liens, under the direction of the court, and to pay such taxes as may be due and unpaid, or as may hereafter become due, and with authority to take and receive said abstract of title, and hold the same subject to the order of this court, and for general relief.

To this bill appellee Holden filed an answer, claiming that the contract set out was in fact a mortgage, and averring that the court had no jurisdiction for the reason that it does not appear by the bill that complainant is in possession of the premises; but it appears from said bill that defendant is in possession, and occupying the same as his home, and claimed

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the same benefit as if the bill were demurred to. When the case was reached for hearing, a motion was made to dismiss the bill for want of jurisdiction, and the court sustained the motion and dismissed the bill at complainant's costs, and such order is assigned for error on this appeal.

Messrs. HOLDEN & FARSON, for appellant.

The quieting and confirming of the title to real estate is peculiarly a matter of equitable cognizance. *Buckmaster v. Ryder*, 12 Ill. 207, 214; *Martin v. Dryden*, 1 Gilm. 187, 210; *Kennedy v. Northup*, 15 Ill. 148, 154; *Frazier v. Miller*, 16 Ill. 48; *Morris v. Thomas*, 17 Ill. 112; *Larmon v. Jordan*, 56 Ill. 204.

In examining these cases it must be borne in mind that statutory changes have taken place from time to time, and also that the case at bar is not one of conflicting, independent legal titles.

Where the relief in chancery is more complete and effectual, it is sustained, even though there is a remedy at law. *Shays v. Norton*, 48 Ill. 100, 105; *Morris v. Thomas*, 17 Ill. 112; *Frazier v. Miller*, 16 Ill. 48; *Martin v. Dryden*, 1 Gilm. 187.

Where there is any ground for equitable relief, jurisdiction will be entertained, even though the main questions could be settled at law. *Booth v. Wiley*, 102 Ill. 84, 114; *Mitchell v. Shortt*, 113 Ill. 251; *McDowell v. McDowell*, 114 Ill. 255.

With the statute and these authorities in view, we claim there is ample jurisdiction, and that the decree of the court below should be reversed. Since the enactment of this statute the complainant is not required to be in possession of the land. *Whitney v. Stevens*, 97 Ill. 482, 488.

Messrs. CHARLES F. WHITE and M. L. WHEELER, for appellees.

The principal purpose of the bill filed in this case, and the principal matters in respect to which relief was prayed, are matters not cognizable in a court of equity. In the bill are embraced an action for rent, a suit for possession and an action

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for the recovery of an abstract; and there can be no doubt that the real purpose of complainant is to obtain, through the aid of a court of equity, possession of the premises in question, and that the matter in reference to the alleged cloud upon the title is merely thrown in to give the court apparent jurisdiction.

For the purpose of obtaining possession a suit had already been instituted before a Justice of the Peace, and a judgment rendered in favor of complainant, which was and is still pending on appeal in the Circuit Court; so that in this respect, the court of chancery was called upon to hear and determine a matter of which it not only had no jurisdiction from its very nature, but which was already in process of adjustment through the pendency of another suit in a court of law.

A complainant, out of possession of premises of which he is the legal owner, can not maintain a bill in chancery against one in possession simply and solely to remove a cloud upon the title.

“There are only two cases under our law in which a party may file a bill to quiet title, or to remove a cloud from the title to real property. First, when he is in possession of the lands; and second, when he claims to be the owner, and the lands in controversy are unimproved and unoccupied; then under the statute he may file such a bill.” See also, *Oakley v. Hurlbut*, 100 Ill. 204; *Gage v. Griffin*, 103 Ill. 41; *Gage v. Parker*, 103 Ill. 528; *Gould v. Sternberg*, 105 Ill. 488; *Whitney v. Stevens*, 97 Ill. 482, 488; *Mitchell v. Shortt*, 113 Ill. 251.

MORAN, P. J. The question is whether, under the facts stated in the bill, a case is made for equitable cognizance. It is contended that a court of equity has no jurisdiction to quiet title or remove a cloud upon the title to real estate, unless the complainant is in possession, or the land is unimproved or unoccupied. Such is no doubt the general rule, but there are well recognized exceptions.

Where a complainant is seeking to remove a cloud which is in the nature of a legal title, which is being or may be asserted

adversely to the title which he desires to protect, then he must show that he is in possession and therefore can not bring ejectment, or must allege and prove that the real estate whose title is clouded, is vacant or unimproved and unoccupied land. But when the facts stated in the bill show that the legal title claimed by the complainant is not disputed by the defendant in possession, but that such defendant sets up some equity not affecting the legal right of possession, but which operates as a cloud on the legal title and prevents a sale of the property, or renders the title unmarketable, then equity has jurisdiction, because an action at law would not afford an adequate remedy, and in such case the possession by the defendant, in subordination to complainant's legal title, will not defeat the jurisdiction.

Taking the facts as alleged in the bill as true, it is very plain that complainant could maintain forcible detainer or ejectment upon the contract, and that defendant could not set up in such suit at law in bar of plaintiff's right of possession, that the contract in fact constituted a mortgage. But a judgment at law would not silence defendant's claim that the contract was but a security for money and that he had a right of redemption, and thus after a successful action at law defendant's claim of an equitable right in the land would be as complete a cloud upon complainant's title as it is now with defendant in possession.

The chancery court has jurisdiction in such a case under the ancient head of equity, that the action at law furnished no adequate remedy, and such jurisdiction has been sustained by the Supreme Court in a case not distinguishable in principle from this case. *Shays v. Norton*, 48 Ill. 100.

And in cases where there is fraud as a ground of equitable jurisdiction, and removing the fraudulent instrument as a cloud is incidental to the general relief, even though the fraudulent title is in its nature a legal title, and the holder of such title is in possession, a court of chancery will have jurisdiction to remove the cloud. *Booth v. Wiley*, 102 Ill. 84.

It is well settled that when equity has jurisdiction for one purpose, it will go on and do complete justice between the

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parties, and will not send them to a court of law because part of the relief may be purely legal relief. So here the court would be authorized to put complainant in possession if upon a hearing he maintained the allegation of his bill as to the nature of the contract. *Green v. Spring*, 43 Ill. 280.

But there is also another ground of plain chancery jurisdiction. The contract set out is claimed by complainant in his bill to be, and on its face is, a contract for the sale of real estate, and defendant is shown to be in possession under the contract, and to be in default.

In such case the vendor may go in the first instance into a court of equity, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the land; and under some circumstances such is his only safe remedy. *Hansbrough v. Peck*, 5 Wall. 497; *Derickson v. Chicago South Branch Dock Co.*, 18 Ill. App. 531.

It is true complainant has specially prayed for entirely different relief, but it is for the court to determine from the material allegations of the bill and the proofs on the hearing, what relief he is entitled to, and to decree him the appropriate relief and thus terminate the suit, unless, to avoid taking the relief which he is found by the court to be entitled to, he voluntarily dismisses his bill.

There was in this bill the prayer for general relief, as follows: "That your orator may have such other and further relief in the premises as equity may require, and this court may deem just." Under this general prayer the court could grant the relief appropriate to the facts, although the bill was not framed with a view to getting such relief. If the facts stated entitled the complainant to a certain relief, it matters not that such statement of facts may have been made with the purpose and belief, on the part of the solicitor who drafted the bill, that the relief sought might flow from a different source of equitable jurisdiction. *McNairy v. Eastland*, 10 Yerg. 309; *Vasant v. Allmon*, 23 Ill. 30.

The dismissing of the bill in this case on motion was, in effect, sustaining a demurrer to the bill, and a demurrer can

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not be sustained on the ground that a party has prayed for the wrong relief where there is also a prayer for general relief, because at the hearing the complainant may ask at the bar for the proper specific relief. *Wilkinson v. Beal*, 4 Mod. 408; *Hopkins v. Snedaker*, 71 Ill. 449; *Curyea v. Berry*, 84 Ill. 600; *Stanley v. Valentine*, 79 Ill. 544; *Wescott v. Wicks*, 72 Ill. 524; *Crane v. Hutchinson*, 3 Ill. App. 30.

There was error, therefore, in dismissing the bill on the motion of the defendant for want of equity, or for want of jurisdiction, and the decree must therefore be reversed and the case remanded.

Reversed and remanded.

E. J. WILBER ET AL.

V.

TJESTOLF TORGERSON.

Life Insurance—Bill to wind up Mutual Benefit Association—Cross-Bill—Application of Reserve Fund—Trust Purpose—Advances of Directors—Jurisdiction.

Upon a bill filed to wind up a mutual benefit association and distribute its assets, and a cross-bill claiming said assets on a death claim against the association, it is *held*: That the fund was a trust fund for the payment of mortuary benefits; that, as there was a trust purpose to which it could be applied, the directors could not apply such fund to the payment of advances made by themselves to discharge a prior death claim for which they might have made an assessment; that their advances made them only ordinary creditors; that the claim of the cross-complainant was not premature, the bill being to wind up the corporation; and that the court below had full jurisdiction of the entire subject-matter.

[Opinion filed December 7, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. SETH F. CREWS and WILBER, ELDRIDGE & SMITH, for appellants.

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Messrs. BLUM & BLUM, for appellee.

MORAN, P. J. Appellants were directors of the Douglass Life Association, a corporation organized under the act of the Legislature providing for the organization and management of corporations, for the purpose of furnishing benefits on the assessment plan to the representatives of the deceased members, in force July 1, 1883. The directors made a faithful effort to build up the association, and advanced their own means in the payment of death claims and for expenses of the association, but finally recommended the re-insurance of the members in another association, *i. e.*, the Mutual Life Association, and a bill was filed by the corporation and the directors to wind up the Douglass Life Association.

Halvordine Torgerson was a member of the last named association, and subsequently to the filing of said bill to wind up the association she died, and appellee, her husband, filed a cross-bill in the said suit, alleging the membership of his said wife in the association, that she was unable to re-insure in the Mutual Life Association because at the time she received notice of the action of the directors she was sick of a disease from which she afterward died, and claiming there was due from the association eighty percent. of the amount which could be collected from the certificates in force, not to exceed \$1,000, and alleging that the association had but little assets and was about to make an assessment upon the certificate holders to pay two other death claims, and would make no provision to pay appellee, and praying for an order directing an assessment to pay his claim.

Afterwards appellee amended his cross-bill by alleging that all other claims except his had been paid, and all other certificates except his had been surrendered, and that there remained in the reserve fund of said association, \$460.20, which was held by the association as a trust fund for the payment of his claim, and asking that said money be decreed to him. This cross-bill was answered by appellants and the case came on for hearing upon a stipulation as to the facts, from which it appears that the association had paid in all, during its existence, five

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death claims; that from an assessment made to pay the death claim of one Rankin there resulted an excess of \$298.13, and said excess, together with \$1,058.51, which latter sum was advanced by the directors from their own money, was paid to settle the death claim of one Pierce.

That said sum of \$1,058.51 was advanced by the directors from their own money in order to avoid making an assessment for the said Pierce death claim at that time.

That when the resolution was passed to wind up the corporation there was in the reserve fund the sum of \$518.68, and that said sum was applied in payment to the directors upon the amount which they had advanced to the death fund, and that there was still due the directors something over \$500. It further appears that said Halvordine Torgerson, deceased, paid all assessments that were imposed by said corporation after the issue to her of her certificate. The certificate issued to her provided, among other things, that within sixty days after the receipt of evidence by the association, of her death, there should be payable to her husband, if living, eighty per cent. of the amount produced by one assessment and not to exceed \$1,000, payable from the death fund of the association. And no claim should be otherwise due or payable except from the reserve fund as hereinafter provided. It further provided that twenty per cent. of the receipts from assessments shall be securely invested in United States, State, county, city or other first class convertible bonds or stock, and such funds when so set apart shall belong to said association, and shall be used only for mortuary benefits without assessments, and to protect the non-forfeitable feature of the association. The court found that appellee's was the only outstanding claim against the association on account of death loss, and that there was in the hands of the directors \$518.68, belonging to the reserve fund, and which was realized from assessments for death losses, and decreed the defendants to pay said sum to appellee.

We think this action of the court was correct. It was the duty of the directors to make an assessment upon the members to pay the death claim of Pierce, and if, instead of doing

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so, they saw fit to advance their own money to discharge said claim, they did not thereby gain a right to appropriate the reserve fund, in payment to themselves of such advance, so long as there was any certificate holder who had the right to have such reserve fund paid out to him as a mortuary benefit.

By force of the statute, Sec. 129, Chap. 73, Starr & C. Ill. Stat., and under the terms of the certificates which the association issued, such reserve fund was a trust fund to be used only for mortuary benefits, without assessments, or applied otherwise for the promotion of the object for which, by the by-laws, it was set apart. The advance of the directors made them only ordinary creditors and the trust fund could not be used to pay such debts, if there were trust purposes to which it could be applied. No doubt the act of the directors in advancing the money was in good faith, and done for what they regarded as the best interest of the association, but the good faith of their act in advancing the money did not take them out of the class of ordinary creditors. The members of those holding death claims have the first right to be paid out of the reserve fund when the association is not in a condition to pay their claims by a regular assessment.

The objection that appellee's claim was premature, as the association would have sixty days after notice of death to pay it, is not in our opinion sustainable. The filing of a bill to wind up the corporation, is an invitation to all persons to present their claims against it, and claims not due at law will be accelerated so as to share in the assets under such circumstances.

It would be flagrantly unjust for the court to proceed to wind up a corporation and distribute its assets, part of which are trust funds, and leave a just claim entitled to have such funds appropriated to its discharge, unpaid, because if the association was continuing in business, it could not be sued thereon at law till after the lapse of a given number of days.

The original bill was filed to wind up the association and distribute its assets, and appellee had an interest in the subject-matter of the proceeding and filed his cross-bill for a proper purpose, to wit, to prevent the misappropriation of a trust

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fund. The court had full jurisdiction of the whole matter and a right to do complete justice by ordering the fund paid to appellee.

The decree of the Superior Court must be affirmed.

Decree affirmed.

LEVI Z. LEITER
V.
MARSHALL FIELD.

24	123
57	95
24	123
157s	163
24	123
189s	1347

Practice—Cause Remanded by Supreme Court—Further Proceedings—Amendment to Bill—Tenant as New Party—Distinct Cause of Action.

1. Where the Supreme Court has disposed of every question between the parties to the record which was presented thereby, and has remanded the cause for further proceedings, the Circuit Court has nothing to do but to enter the decree directed by the Supreme Court. It can not allow an amendment to the bill, which presents no new question as between the parties to the record.

2. A complainant can not be compelled to add parties to his bill if he chooses to take the responsibility of their not being made parties.

3. In the case presented, it is *held*: That the decision of the Supreme Court having settled every question between the parties to the record, the complainant can not amend by making his tenant a party complainant, nor can he require the cross-complainant to make said tenant a party defendant to his cross-bill; and that the injury, if any, to the leasehold estate of the tenant, is distinct from that to the reversionary interest, and constitutes a distinct cause of action.

[Opinion filed December'7, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. ISHAM, LINCOLN & BEALE, for appellant.

Messrs. MELVILLE W. FULLER and WILLIAMS & THOMPSON, for appellee.

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MORAN, P. J. Appellant filed his bill in the Circuit Court of Cook County, alleging that appellee had entered upon his premises and excavated the earth to a great depth, and erected on said premises a stone wall of great thickness, and that he claimed the right and threatened to further encroach on and invade appellant's premises, and praying an injunction to prevent such threatened encroachment.

Appellee answered the bill and filed a cross-bill which prayed that complainant be enjoined from interfering with the construction of said wall, or with the wall when constructed, and from prosecuting a certain ejectment suit relating to the premises which appellant had commenced.

On the hearing the Circuit Court granted the relief prayed by the complainant and dismissed the cross-bill, and the decree of the Circuit Court was affirmed by this court, and to the report of the case in 18 Ill. App. 155, reference is made for a full statement of the pleadings and matter in controversy, as it is not deemed necessary to state the same here at length.

The case was appealed to the Supreme Court, and by that court the judgment of this court and of the Circuit Court was reversed and relief ordered to appellee upon his cross-bill. *Field v. Leiter*, 118 Ill. 17.

The mandate of the Supreme Court remanded the cause to the Circuit Court of Cook County "for such other and further proceedings as to law and justice shall appertain, conforming to the opinion of this court herein filed."

The case was regularly re-docketed in the Circuit Court, and thereupon appellant moved the court for leave to amend the bill of complaint, so as to bring in as a party complainant, with proper allegations showing interest, the Chicago Board of Underwriters, a corporation who were in possession and occupancy of the premises in controversy under a lease, which was executed prior to the making of the contract which was construed by the Supreme Court to entitle appellee to enter upon the premises and erect the foundation and wall complained of in the original bill.

A motion was also made by appellant that appellee be required to amend his cross-bill so as to make the said Chicago

Board of Underwriters a party defendant to said cross-bill, and that the cause stand over until such amendment be made, but the court entered a decree overruling both said motions and dismissing the original bill for want of equity, and granting the relief prayed by the cross-bill of appellee. It is now urged by appellant that the court erred in denying the leave to amend complainant's bill and in not requiring appellee to amend his cross-bill, and it is contended that the assertion by appellee of the right given to him by the decree entered upon the cross-bill necessarily involves an invasion of the previously acquired rights of appellant's tenants in the premises.

We are of opinion that all the rights of the parties to the record could be and were settled on the original pleadings by the judgment of the Supreme Court.

The entire controversy presented was determined, and the opinion of the Supreme Court declared the merits to be against appellant, and closed thus: "The original bill should have been dismissed, and the relief which it is indicated in the opinion defendant is entitled to, should have been decreed to him on this cross-bill. The judgment of the Appellate and Circuit Courts will be reversed and the cause remanded to the Circuit Court for further proceedings conforming to this opinion."

This was an end of the matter as between appellant and appellee, and the Circuit Court had no power to permit any amendment to the bill by appellant which would re-state his case in any new aspect, or present any feature affecting his equity which he might have stated, but failed to state in his original bill. In the original bill the fact of the tenancy was stated, and so far as the existence of the tenancy modified the rights of appellant or appellee, the Supreme Court must be held to have regarded that fact as well as all others in the record.

The offered amendment would present no new question as between appellant and appellee, and as every question between them presented by the record was disposed of, there was nothing for the Circuit Court to do but to enter the decree as directed by the Supreme Court. *Wadhams v. Gay*, 83 Ill. 250; *Newberry v. Blatchford*, 106 Ill. 584.

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The equity sought to be asserted by the amendment to the bill is the equity, not of appellant, but of his tenant; but the decree entered can not affect the rights of the tenant, for no one not made a party and not a privy to the suit will be bound by the judgment or decree rendered therein. It may be if the tenant applied to the court and asked to become a party that he would be so admitted, but his equities, if any he has, are to be asserted by himself and not by appellant.

The objection for want of parties defendant to cross-bill is not well taken. A complainant can not be compelled to add parties to his bill if he chooses to take the responsibility of their not being made parties. *Searles v. Jacksonville R. R. Co.*, 2 Woods' C. C. 621.

The rights of the tenant are not such as must be ascertained and settled before the rights of the parties before the court could be determined. The injury, if any, to the leasehold estate of the tenant, is distinct from that to the reversionary interest of appellant, and constitutes a distinct cause of action.

The course pursued by the Circuit Court, in overruling the motions to amend the bill and cross-bill and granting the relief upon the cross-bill indicated in the opinion of the Supreme Court, was free from error, and the decree will, therefore, be affirmed.

Decree affirmed.

WILLIAM STEIN ET AL.

V.

IRA H. ABELL.

Trust Deeds—Foreclosure—Extension—Election to Declare Principal Due—Evidence.

Upon a bill to foreclose a trust deed this court affirms the decree of the court below for the complainant, the defense that the notes secured were extended without a reservation of the right to declare the whole principal due for default, not being sustained by the evidence.

Stein v. Abell.

[Opinion filed December 7, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. IRA W. BUELL, for appellants.

Mr. R. A. CHILDS, for appellee.

McALLISTER, J. This was a bill in chancery, brought January 26, 1886, by appellee against appellant Stein and others, to foreclose a trust deed of certain real estate therein described, made July 1, 1882, by said Stein to one Chase, as trustee, to secure the payment of a promissory note of that date, made by said Stein to Ruth G. Abell, whereby the former promised to pay the latter the sum of \$1,200, three years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July, until principal and interest were paid. The trust deed, which was set out in the bill, contained the usual covenants as to taxes, and the provision giving the said payee or any holder of said note the right to declare the whole indebtedness due in case of default in paying any taxes, said interest or principal, or any part thereof, when due. The bill alleges that said Ruth assigned said note to appellee before maturity, and default in Stein, praying for a foreclosure, etc. The defense relied upon by Stein was that when the note matured, the appellee, as holder of said note, for a valuable consideration, orally agreed with said Stein to extend the time of payment of said note for the period of three years, which had not expired at the commencement of this suit; that this was a new agreement which failed to reserve the rights of appellee under said trust deed, and the provision as to the right of election to declare the whole principal due for default in paying any installment of interest; and that, although Stein had since such new agreement made default as to payment of interest according to the terms of the note and trust deed, still the principal could not be declared due before the time of such extension expired.

C., B. & Q. R. R. Co. v. Morkenstein.

Issue having been taken upon the answer, the case was referred to a master to take proofs and report his conclusions. The evidence was taken before the master, and his report of the same and conclusions therefrom were made. Upon which a decree passed, finding the whole sum due for principal and interest, and directing a sale and foreclosure; from that decree this appeal was taken. The record contains no bill of exceptions or certificate of evidence.

We have carefully examined the evidence taken before and reported by the master, and are of opinion that it preponderates against the defense relied upon, and in support of the decree, which should be affirmed.

Affirmed.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY

V.

LOUIS MORKENSTEIN, BY NEXT FRIEND, ETC.

Personal Injuries—Pleading—Declaration—Variance—Instructions.

1. In an action for a personal injury, if the plaintiff needlessly describes the tort and the means by which it is effected, with minuteness and particularity, and the proof substantially varies from the statement contained in the declaration, the variance will be fatal.

2. In the case presented, it is *held*: That the evidence fails to support the allegations of the declaration; that it shows the plaintiff to have been a trespasser in the yard of the defendant; and that an instruction, submitting to the jury a cause of action substantially variant from that described in the declaration, and a question of wilful tort, having no basis in the evidence, was erroneous.

[Opinion filed December 7, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action by appellee against the railroad corporation, appellant, to recover for a personal injury to the former,

occurring November 29, 1882, in the City of Chicago, whereby he lost one of his arms. The declaration contains three counts: 1. That the plaintiff, at the time, was lawfully upon a public highway of said city, which was crossed there by tracks of defendant's railway, and the latter ran its locomotive engine across said highway without ringing a bell or sounding a whistle as required by statute, and plaintiff was unavoidably struck thereby and injured; 2. That plaintiff was lawfully upon said public highway and was struck by defendant's locomotive and train, being run across the same at a rate of speed faster than that prescribed by any ordinance of said city; 3. That plaintiff was lawfully upon a public highway of said city which was crossed by defendant's tracks, and it had no flagman at such crossing as required by an ordinance of said city, by means whereof he was struck by a train of defendant passing said crossing.

The plea was the general issue. It appeared on the trial that the place where the plaintiff was at the time of the injury, was in the yard of defendant, lying between Harrison and Polk streets, and that there was no public highway there.

The testimony of and on behalf of plaintiff tended to show that between the hours of 12 and 1 o'clock, in the middle of the day in question, the plaintiff, who was then a boy eight years of age, in company with a brother thirteen years of age, without either of them having any purpose of business with defendant, went eastward from Canal Street down a driveway into said yard, and while the plaintiff was standing momentarily near to the west side of the track of defendant, running in a north and northwesterly direction, a train of empty freight cars came from the south, being backed, with the locomotive at the south end of the train, and moving noiselessly toward the freight house that was about, as they said, some fifteen feet north of where they were standing on said driveway; that while plaintiff was so standing, his brother was also standing upon said track north of him and some five feet away; that hearing no signal and being unaware of the approach of said train the corner of the foremost car struck him against the shoulder, knocked him down upon his belly, bruising his head,

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and his right arm went over the rail, was run over, and crushed so as to require amputation; that his brother to save himself seized hold of the ladder on the car and was carried to opposite the platform of the freight house, when he threw himself off in safety on the platform. And the evidence is all one way, that the plaintiff was found and picked up near a waterspout of the freight house, which defendant showed was sixty-eight feet north of said driveway. There was a strong preponderance of evidence to the effect that both the boys were hanging on the cars, the plaintiff as well as his brother, before they reached the freight house, and that plaintiff fell off by the water-spout where he was found and picked up. Neither of the boys could give any account as to the plaintiff's getting to that place, if struck, knocked down and his arm run over, at the place where they said it happened on the driveway.

The evidence for the defendant showed conclusively that said driveway was defendant's own property; that it was in no sense a public highway, though there was evidence tending to show a license on the part of defendant to the public to use it.

The plaintiff gave no evidence at all tending to show that said train was running at any undue rate of speed, but defendant proved that it was running at the rate of only three or four miles an hour. The two boys testified that they heard no bell ring; but the defendant showed that there were twenty-nine freight cars in the train; that the engine was 600 feet away from the foremost car as they were backing; that there was a steam apparatus for ringing the bell, and evidence tending to show that it was ringing at the time. There was no evidence tending to show that any person connected with the train saw either of the boys, or knew of their presence there; but three persons connected with the freight house testified to seeing the plaintiff hanging on a train. There was no evidence tending to show any wilfulness or wantonness on the part of any of defendant's agents or servants.

The court on behalf of plaintiff, gave the jury the following instruction:

"4. The jury are instructed that, although they may believe

from the evidence that plaintiff was improperly or unlawfully upon the defendant's railroad track, that fact alone did not discharge the railroad company or its employes from the observance of reasonable care, and if you believe from the evidence that plaintiff was injured by the defendant's train while so improperly or unlawfully on said tracks, but that the injury complained of was wilful and the direct and natural result of the negligence of defendant or its employes, as charged in the declaration, then you must find for the plaintiff unless you believe from the evidence that the plaintiff himself was exercising a less degree of care as could be expected of him under the circumstances proven in this case."

The jury returned a verdict for plaintiff, assessing his damages at \$3,000, and the court, overruling defendant's motion for a new trial, gave judgment upon the verdict. Hence this appeal.

Messrs. DEXTER, HERRICK & ALLEN, for appellant.

Messrs. M. SALOMON and SIGMUND ZEISLER, for appellee.

McALLISTER, J. In describing the tort complained of and the means by which it was effected, the plaintiff has alleged in each of the several counts of his declaration, that while he was upon the public highway of the City of Chicago and in the exercise of the legal, common right to be and travel thereon, he was necessarily and unavoidably run against, etc., by defendant's locomotive and train.

The rule is that where the pleader, though needlessly, describes the tort and the means by which it is effected, with minuteness and particularity, and the proof substantially varies from the statement, there will be a fatal variance and the plaintiff will fail in his action. *Moss v Johnson*, 22 Ill. 633; *City of Bloomington v. Goodrich*, 88 Ill. 558; *L. S. & M. S. R'y v. Beam*, 11 Ill. App. 215.

The plaintiff's evidence not only failed to support the allegations respecting such public highway but the affirmative evidence on the part of defendant clearly established the fact that

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there was no public highway at the place where the plaintiff received his injury; but that he was, at the time, in the defendant's yard, its private property, upon no purpose of business with the defendant, and therefore a trespasser. From this view it is apparent that the fourth instruction, given on behalf of the plaintiff, was erroneous, because it submitted to and authorized the jury to find for the plaintiff upon a cause of action substantially variant from that described in either count of his declaration. Not only that, but it submitted to the jury the question of a wilful tort on the part of defendant, its agents and servants, when there was no evidence sufficient to go to the jury upon that question. For that error the judgment must be reversed and the cause remanded.

Judgment reversed.

CARL THOR ET AL.

V.

OLE OLESON ET AL.

Husband and Wife—Real Property—Secret Trust—Equitable Estoppel—Evidence.

Upon a bill filed by creditors of the estate of defendant's deceased wife to subject certain real estate, standing of record in his name, to the payment of their claims, it is *held*: That the complainants have failed to show that the property in question was purchased with the wife's money, or to make out an equitable estoppel; and that the evidence sustains the decree of the court below for the defendant.

[Opinion filed December 7, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. I. K. BOYESEN and JOHN LYLE KING, for appellants.

Messrs. FRANK J. CRAWFORD and B. F. RICHOLSON, for appellees.

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Per Curiam. The bill in this case, which was dismissed on hearing by the Circuit Court, was filed by appellants, who were creditors of the estate of Mrs. Martine Oleson, to subject certain real estate which stands of record in the name of Ole Oleson, the surviving husband of Martine Oleson, to the payment of appellants' claims against her estate, on the ground, as alleged, that though the land was deeded, when purchased, to said Ole Oleson and has always stood in his name, yet it was purchased with the money of said Martine Oleson, and the title taken and held by said Ole Oleson in secret trust for her. The bill also goes upon the further theory that if the property was in fact purchased with the money of Ole Oleson, yet he allowed said Martine to treat it and deal with it in her lifetime as her own property; that she made the leases to the tenants and collected the rents, and made improvements and repairs upon the property and by her apparent ownership of it established a reputation for wealth which enabled her to have credit and to incur the indebtedness which she owed to the different appellants. The evidence on all the various issues of fact arising upon the hearing is very voluminous and very conflicting, and we think it would subserve no useful purpose for us to enter into an elaborate discussion of it. It was incumbent on the complainant to make out by the evidence such facts as would sustain either the one or the other of the theories advanced by the bill, and after a careful examination of the evidence contained in the record, and full consideration of the elaborate and able argument of the counsel for appellants, we are not able to say that the court below erred in the conclusion reached.

We are of opinion that complainants have not made out that the property in question was purchased with the money of said Martine Oleson, deceased, by any such preponderance of the evidence as would justify this court in reversing the finding of the chancellor who heard the case in the court below, and found that issue against the complainants.

On the question whether the appellee allowed his wife to so deal with the property as to hold her out as the apparent owner of it and estop him from denying, as against her creditors, that she was the owner of it in fact, the case presents some

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singular and unusual phases, and the proof establishes several elements that go to support complainants' theory. But in our opinion there are elements necessary to make out an equitable estoppel as against appellee, that are wholly wanting.

There is no evidence showing any fraudulent misrepresentations as to the title by appellee, to induce appellants to give credit to his wife upon it. His submission to the dictation and control of a termagant wife was for the sake of his own peace and not for the purpose of representing her as the owner of land.

His title was of record, and complainants neither examined the record nor inquired of him as to the ownership. He did no act to conceal the truth from them and they were themselves negligent in not learning what the record would show them. His silence under the circumstances disclosed is not to be punished by the application to him of the doctrine of equitable estoppel.

We are of opinion that the decree of the court below was right under the facts shown by the evidence, and the same will therefore be affirmed.

Decree affirmed.

FRANK W. HARVEY

V.

CARLOS A. COOK.

Agency—Action for Commissions for Procuring Advertising Contracts—Burden of Proof—Acceptance—Misconduct of Agent—Fraud—General Issue—Instructions.

1. An instruction which purports to embrace every element necessary to a recovery, is defective if any material element is omitted.

2. An agent is entitled to his commissions only upon a due and faithful performance of all the duties of his agency.

3. The construction of written contracts is a question of law and can not be submitted to the jury.

4. In an action to recover commissions for procuring certain advertising contracts, it is *held*: That the undertaking of the plaintiff was to procure

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contracts of a particular description to be signed by persons of a definite description; that the burden of proof was upon him to show performance; that the reception by the defendants of the papers in question, without inquiry as to the genuineness of the signatures, did not relieve the plaintiff from the burden of proof; that certain instructions were defective; and that the defendant had the right under the general issue to show gross misconduct, fraud, negligence and unskillfulness by the plaintiff in the performance of his duties as agent.

[Opinion filed December 7, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

This action was brought by appellee Cook against James M. and Frank Harvey, doing business as clothing merchants under the firm name of Harvey Brothers, to recover commissions upon 362 advertising contracts with the publishers of different newspapers procured by Cook as agent for Harvey Brothers for that special purpose. Before trial James M. Harvey died, and the suit was carried on against the other defendant as surviving partner. Upon trial by jury, a verdict was rendered against defendant for \$1,810 damages, and the court requiring the plaintiff to remit \$1,000 of that sum, gave judgment for \$810 besides costs, from which this appeal was taken by defendant.

Plaintiff proved that procuring advertising was his profession or business and had been for twenty-three years. To show his authority to act for Harvey Brothers, he proved their signatures, and gave in evidence the following:

“CHICAGO, Oct. 6, 1882.

“In order to secure general newspaper advertising, we hereby authorize C. A. Cook & Co., Chicago, Ill., to make all advertising contracts in our name with the publishers of different newspapers, in accordance with the printed agreement or form for that purpose.

“In consideration of the said C. A. Cook & Co. making such advertising contracts, we hereby agree to pay to C. A. Cook & Co. the sum of five dollars on each $\frac{1}{4}$ or 25 per cent.

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contract for each and every contract *signed by the publishers* on the delivery to us of said contracts.

“Signed,

HARVEY BROS.,

“84 and 86 State St.”

The plaintiff testified that the form of the advertising contracts referred to in the above, was the same as one he held in his hand. That he had procured 362 of them and delivered them to defendant, all in the same form but differently signed. The one he held in his hand was then given in evidence, and was as follows:

“ADVERTISING CONTRACT
AND
AGREEMENT. } *Chicago, October, 1882.*


“We hereby agree to furnish to the publishers, or order, below named, such clothing as may be ordered on the terms and conditions of the contract hereunder written and printed.

Signed,

HARVEY BROTHERS.

“I hereby agree to publish in the Valparaiso Avalanche, published at Valparaiso, Townlen Co., State of Nebraska, the advertisements of Harvey Bros., Chicago, Ill., as per copies to be furnished at any time, and to be inserted as ordered at our lowest cash rates, to the amount of \$50.


“The payment for the said advertising is agreed to be made by Harvey Brothers in *fine clothing*, at their regular cash prices as follows: On all clothing ordered by us under this contract, we are to receive from Harvey Brothers a *discount* of *one-fourth*, or 25 per cent. (excepting during their *special discount* sales) until the amount, \$50.00, charged for advertising, is canceled by said discounts.

“ N. B.—This contract is good for \$200 in clothing as specified, can be ordered at any time and in lots to suit the holder of this contract.

“We also agree to mail copy of our paper regularly, containing said advertising, to Harvey Brothers, 84 and 86 State Street, Chicago.

Accepted, S. M. WEED.

“Dated, Oct. 28, 1882.

“ Please fill up date, sign, and *return this* to C. A. Cook & Co., Chicago.”

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There was a conflict of testimony as to the above being the form of contract to be adopted, and it was claimed by defendant that after a form had been decided upon the plaintiff caused material alteration of it without defendant's assent thereto.

There was no proof in the case that the signatures of publishers, purporting to be affixed to the alleged 362 advertising contracts, were any of them genuine, or that Harvey Brothers, or either of them, had any knowledge or information as respected the matter. The only evidence relied upon in that behalf was two receipts which Cook had prepared and taken respectively with two batches of contracts, as follows:

"CHICAGO, Oct. 21, 1882. Received of C. A. Cook & Co., sixty-six advertising contracts, as per agreement, at \$5 each.

"HARVEY BROTHERS."

"CHICAGO, Oct. 25, 1882. Received of C. A. Cook & Co., ninety-six advertising contracts, as per agreement, at \$5 each.

"HARVEY BROTHERS."

The defendant offered to prove that Cook prepared the form of contract, and that it was made indefinite, and making it so was part of a fraudulent scheme on the part of Cook; also, that Harvey Brothers neither derived any benefit from the said advertising contracts, or any of them, on account of their form. But the court, on objection by plaintiff, excluded the evidence.

The court instructed the jury on behalf of the plaintiff as follows:

"1st. If the jury believe from the evidence that Harvey Brothers on or about October 6, 1882, executed the written document which has been offered in evidence, authorizing the plaintiff to make the advertising contracts therein referred to, and that the plaintiff did afterward, in pursuance of said authority, procure and deliver to said Harvey Brothers a large number of advertising contracts, such as he was by said document authorized to make, then the jury should find the issues for the plaintiff, and in such case the measure of damages will be the contract price agreed upon between the parties for the procuring of such advertising contracts.

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“And the jury are instructed that if they believe from the evidence that at the time of the delivery of such contracts to the defendants, no question was made about the genuineness of the signatures to such advertising contracts, and that the defendants accepted said contracts as having been properly signed, or signed by the parties purporting to have signed them, then it was not necessary in the first instance for the plaintiff to introduce evidence on his part as to the genuineness of such signatures.”

Mr. HENRY W. MAGEE, for the appellant.

Mr. FREDERIC ULLMAN, for appellee.

McALLISTER, J. On the trial, the plaintiff below gave evidence tending to show in a general way that he had procured for Harvey Brothers 362 advertising contracts, and claimed that, under the contract with them, dated October 6, 1882, he was entitled to a commission of \$5 upon each. No direct evidence as to the genuineness of the signatures of the purported publishers appearing thereon, was offered; but he produced in evidence a written acknowledgment signed by Harvey Brothers, dated October 21, 1882, of the reception by them from him of sixty-six advertising contracts as per agreement at \$5 each; also another dated October 25, 1882, for ninety-six and couched in the same language.

By the first branch of the first instruction given for the plaintiff the jury were directed (after a reference to said contract of October 6, 1882, authorizing the plaintiff to make the advertising contracts therein referred to) that if the plaintiff, afterward, in pursuance of said authority, procured and delivered to Harvey Brothers a *large number* of advertising contracts, *such as he was by said document authorized to make*, then the jury should find the issues for the plaintiff, and in such case the measure of damages will be the contract price agreed upon between the parties for the procuring of such advertising contracts. That instruction purports to embrace every element necessary to a recovery.

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The contract of October 6, 1882, contains this stipulation: "In consideration of the said C. A. Cook & Co. making such advertising contracts, we hereby agree to pay to C. A. Cook & Co. the sum of \$5 on each $\frac{1}{4}$ or 25 per cent. contract for each and every contract *signed by the publishers*, on the delivery to us of said contracts." In looking at the whole instrument, it will be perceived that aside from the advertising contract being signed by the publishers, they were to be in accordance with a printed agreement or form for that purpose.

The generally accepted rules as to an agent's right to commissions, are stated in Story on Ag., Sec. 331: "The agent is entitled to his commissions only upon a due and faithful performance of all the duties of his agency in regard to his principal. For it is a necessary element in all such cases, that, as the commissions are allowed for particular services to the principal, it is a condition precedent to the title to the commissions that the contemplated services should be fully and faithfully performed." Hoyt v. Shipherd, 70 Ill. 309.

The above instruction contains no hypothesis as respects the genuineness of signatures or of the fact of the persons purporting to have signed being in reality publishers of newspapers; and it avoids doing so by the substitution of the hypothesis that the advertising contracts were "such as he was by said document authorized to make." What was that but the submission of a question of law to the jury? It is manifest that the jury could determine the point thus submitted only by construction of the original written contract and of the several advertising contracts. The construction of written instruments is always a question of law.

By the second branch of the same instruction, or more properly, the second instruction for plaintiff, the court directed the jury that if, at the time of the delivery of such contracts to the defendants, no question was made about the genuineness of the signatures to such advertising contracts, and the defendants accepted said contracts as having been properly signed, or signed by the parties purporting to have signed them, then it was not necessary in the first instance for the plaintiff to introduce evidence on his part of the genuineness of such signatures.

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The hypothesis embraced does not include the matter of the persons who purported to have signed, being, in fact, publishers of newspapers. The undertaking of the plaintiff was to procure for defendants advertising contracts of a particular description to be signed respectively by persons of a definite description.

The performance of that undertaking by the plaintiff was a condition precedent to his right of recovery, and the burden of proof was upon him to show such performance, or that the defendants, by some act, had lawfully discharged him therefrom. The reception by the defendants of the papers in question of plaintiff, without any question on the part of the former as to the genuineness of signatures, could have no effect to relieve the plaintiff from the burden of proof, because the law imposed no duty upon the defendants to make such question or inquiry at that time. The law gave them such time thereafter as would, under all the circumstances, be reasonable, in which to ascertain those matters. Take, for instance, the case of a delivery under an executory contract of sale of goods of a particular quality or description, or under a sale by sample, the buyer is not bound to make inquiry at the time of delivery, but has such time thereafter as is reasonable under all circumstances in which to ascertain the true quality or description of the goods delivered. So that in order to discharge the plaintiff from performance or relieve him from the burden of proof it was necessary that something more should have been embraced in the instruction. It should have contained the hypothesis that the defendant received the papers with the intention of waiving all inquiry respecting the genuineness of signatures, or that the reception of them on their part was with the intention to retain them as in full compliance with and satisfactory fulfillment of the original contract. And such intention must have been manifested in a way to be capable of proof.

The instructions referred to were erroneous and misleading for the reasons stated.

We are of opinion that the defendant had the right under the general issue to show gross misconduct, fraud, neg-

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ligence and unskillfulness on the part of plaintiff in the performance of his duties as agent, and thus defeat his right to compensation. *Denew v. Deverell*, 3 Camp. 451; *Dodge v. Tielson*, 12 Pick. 328; *Fisher v. Dynes*, 62 Ind. 348; *Prescott v. White*, 18 Ill. App. 322.

The judgment must be reversed and the cause remanded.

Judgment reversed.

P. C. HANFORD OIL COMPANY ET AL.

V.

FIRST NATIONAL BANK OF CHICAGO.

Voluntary Assignment—Preferences—Note and Warrant of Attorney—Special Agreement.

A promissory note and warrant of attorney given for a *bona fide* indebtedness before the maker has decided to make a general assignment, creates a valid preference, although given and taken subject to an informal agreement on the part of the maker to notify the holder, if he becomes financially embarrassed, and although he acts upon such agreement after he has decided to make the assignment.

[Opinion filed December 7, 1887.]

IN ERROR to the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

This is error to the Superior Court upon a decretal order in a proceeding under the voluntary assignment act.

It appears that the firm of Ferris & Avery, doing business in Chicago as dealers in oils and paints, being in good financial credit, expecting to continue their business and having at that time no intention of making an assignment of their estate for the benefit of their creditors, borrowed, October 13, 1884, of the First National Bank of Chicago, of which they were customers, the sum of \$1,500, for which, in the usual course of business, they gave to the bank their promissory note payable

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in ninety days, with a warrant of attorney in the usual form, as security, authorizing the entry of judgment on said note at any time before or after the maturity thereof; that said note and warrant of attorney were given and taken subject to an understanding between said bank and their said customers that the latter should notify the former of the happening of anything which would make it expedient for the bank to act upon its said security.

It appears that about December 11, 1884, said Ferris & Avery became seriously embarrassed, ascertained that they were insolvent, and after some delay they decided upon making a general assignment, and instructed their attorney to prepare the instrument, which he accordingly proceeded to do. Afterward, December 17, 1884, the instrument of assignment being nearly, if not quite completed, an assignee selected, who had promised to serve, Mr. Ferris of said firm, and who had negotiated said loan with Mr. Gage, the financial manager of said bank, went to Mr. Gage in pursuance of said arrangement as to notice of any trouble and informed him that his firm was in trouble; thereupon Gage took the note and warrant of attorney to the bank's general attorney and directed him to act in the premises. It appears that judgment was immediately entered upon said note by virtue of said warrant of attorney, in favor of said bank, and execution issued, delivered to the Sheriff, and levied on the stock of goods of Ferris & Avery, before any possession was taken by the assignee, and that the levy was made even before the execution of the assignment was completed and the assignee qualified. An application having been made by the assignee to the County Court for an order upon the Sheriff to turn said goods over to him, subject to the lien of said execution, which was to be first paid, and the bank having consented upon the express condition that its said lien and right should be preserved, on December 18, 1884, the County Court under that application and consent made an order directing the Sheriff to turn over said goods to said assignee, that he sell them and out of said proceeds pay said execution. January 6, 1885, the County Court made a further order modifying the former and authorizing parties in

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interest to contest the validity of such execution lien. January 14, 1885, a petition was filed by P. C. Hanford Oil Company and others, creditors of said Ferris & Avery, asking the court to declare said execution lien invalid on the ground that the act of creating it was the act of Ferris & Avery after they had decided to make a general assignment, was a part of the transaction of making said assignment, and, therefore, was an unlawful preference. Upon a hearing the County Court sustained the validity of said lien. Upon hearing, on appeal to the Superior Court, that court also held the same way and dismissed the petition as to said bank. Upon that order the petitioners bring error to this court.

Messrs. TRUMBULL, WASHBURN & ROBBINS, for plaintiffs in error.

“When the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken; the law will regard all his acts having for their object and effect the disposition of his estate as part of a single transaction; and on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors.” *Preston v. Spaulding*, 120 Ill. 208, 217.

The principle of that case would seem to be decisive of the case at bar. Here the debtors, “conscious of their hopeless insolvency,” determined to make an assignment, and “entered upon the execution and performance thereof” by securing from the proposed assignee his consent to act, and having their assignment drawn up. They seek in the assignment, to prefer defendant in error and another creditor. Their attorney prevents this. They then resort to a “shift or artifice, under the form of law,” to attain that desired object. To the other creditor they give a judgment note authorizing immediate judgment. With the defendant in error this is not necessary

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A note of this character, not yet due, but authorizing judgment at any time, is already held by it. But the note lies dormant. The bank is awaiting its maturity, with no intention of acting at present. Some act of the debtors is necessary to attain their object—a preference to this bank. One of them goes to the bank and says: “We are in trouble and are going to make an assignment this afternoon.” The attorney of the bank accompanies this debtor to the office of his attorney. There is discussed the question we are now considering. They conclude the statute can be thus evaded. The subsequent acts are then so timed as to attain, it is thought, the original purpose of the debtors—the preference of the defendant in error. All the elements in *Preston v. Spaulding* are here present, and more—knowledge by the creditor of the contemplated assignment and its collusion with the debtors to evade the statute, while in that case the creditors were “guiltless of any wrong.” See *Heineman v. Hart*, 55 Mich. 76.

The assignee’s title as against the execution became perfect by the delivery of the assignment before the execution reached the hands of the Sheriff, although it was not filed for record nor possession obtained under it until after such delivery to the Sheriff. Even where the rule that retention of possession is *per se* conclusive evidence of fraud, the assignee has a reasonable time in which to take possession before the lien of an execution can attach. *Seymour v. O’Keefe*, 44 Conn. 131; *Bump on Fraudulent Conveyances*, 135; *Reed v. Eames*, 19 Ill. 594.

But while this *per se* rule prevails in this State, in transactions between persons in their individual capacities, it has never been yet announced as against an assignee, and should not be.

Mr. ORVILLE PECKHAM, for defendant in error.

McALLISTER, J. The promissory note and warrant of attorney in question, made October 13, 1884, by Ferris & Avery to the First National Bank of Chicago, were given as security for a *bona fide* indebtedness of the makers to the bank, were

designed and intended by the parties to give the bank a preference as respected such indebtedness over all the other creditors of Ferris & Avery; and to make such security effectual as creating a preference, the same was given and taken subject to an informal agreement on the part of Ferris & Avery to the effect that in case financial trouble should afterward overtake them, they should aid the bank in rendering said preference effectual.

The giving of such note and warrant of attorney was nearly two months prior to the time when Ferris & Avery first formed the determination to make a general assignment of all their property for the benefit of their creditors, and while they had full dominion over it.

We are of opinion that, under that state of facts, the acts of Ferris & Avery, or of Mr. Ferris, done after they had formed the purpose of making such general assignment for the purpose and with the view of aiding the bank in rendering its security and intended preference effectual, must be considered as belonging to, and forming a part of, the transaction of creating said preference, and not as forming a part of the transaction of making a general assignment.

The reasoning of Mr. Justice Cole in *Sampson v. Arnold*, 19 Iowa, 487, *et seq.*, seems to us to be conclusive upon that point. This case is, therefore, distinguishable from that of *Preston v. Spaulding*, 120 Ill. 208, 217, and not governed by it.

We think the order upon which error in this case is assigned should be affirmed.

Affirmed.

Dunham v. Laflin.

JOHN H. DUNHAM ET AL., EXECUTORS, ETC.,
V.
MATHEW LAFLIN.

Bill for Accounting--Cross-Bill--Trust Funds.

Upon a bill for an accounting, the adjustment of rights and claims and division of certain trust funds, the proceeds of the interest of the parties in a corporation of which they were the promoters, this court holds that the evidence sustains the decree of the court below.

[Opinion filed December 14, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN C. BAGBY, Judge, presiding.

Mr. E. J. WHITEHEAD, for John H. Dunham, appellant.

Messrs. McCAGG & CULVER, for D. R. Holt et al., appellants.

Mr. JOHN WOODBRIDGE, for appellee.

Per Curiam. This was a bill in chancery brought in the court below some time in 1860, by appellee Laflin against appellants Dunham and Holt, and Solomon A. Smith, who died pending the suit, and his personal representatives were substituted as parties.

It appears that October 5, 1858, the said Laflin, Dunham, Holt and Smith organized a corporation known as the Illinois Stone Coal & Mining Company, with a capital stock of \$16,000, divided into 160 shares of \$100 each, of which Laflin and Dunham each owned forty shares, and Holt and Smith each owned thirty-nine shares, and that the other two shares were owned by other parties; that Laflin was the president and financial manager and Holt the treasurer; that although the business of the corporation was reasonably prosperous, yet differences

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and ill-feelings arose between some of the shareholders above named, so that they resolved to dispose of all their interests in the corporation and divide the proceeds ratably between themselves; that April 18, 1860, Laflin, Dunham, Holt and Smith sold all their shares and interest in the corporation for the sum aggregate of \$31,000, each one receiving only part payment, the remainder being notes, city script and city lot, situate in Carpenter's subdivision in West Chicago, and money. By means of that transaction there came into the hands of Laflin funds aggregating as he claimed only \$2,339, and into the hands of said Holt the sum of \$13,136.13, which they at that time respectively held in trust for the several parties in interest; that the parties being unable to come to a settlement between themselves, by agreement or compromise, Laflin brought his bill, as above stated, for an accounting, adjustment of rights and claims, and division of the funds so held in trust. The defendants to the original filed a cross-bill against Laflin charging him with having undisclosed funds in his hands and with various breaches of duty while acting as such president as aforesaid, and with reference to the disposition not only of the stock but of the assets of said corporation. Answers and replications were filed and March 24, 1884, the case was referred to a master who, after taking the evidence, made an elaborate report in which he found that Laflin had in his hands of said funds and assets the sum of \$1,900 in addition to said sum of \$2,339, and held him chargeable therewith, and also held him responsible for preventing a settlement between the parties by insisting upon invalid claims in his favor, which conduct on his part affected the question of his right to be allowed interest or to have interest charged against Holt. Upon exceptions to the master's report made on behalf of Laflin, the chancellor found, in substance, that Laflin did not have in his hands any sum in addition to said sum of \$2,339; that the failure of the parties to effect a voluntary settlement was not due to his conduct more than to that of the other parties; that Holt having received more than at the rate of six per centum per annum of interest on the funds in his hands, was justly chargeable with interest thereon at the rate

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of six per centum per annum, and January 2, 1886, a final decree passed, fixing the amount to be paid to, and by each of the respective parties, upon the basis aforesaid. From that decree Dunham, Holt and the legal representatives of Solomon A. Smith, deceased, prosecute this appeal.

In this court the case is narrowed down to the questions: 1. Whether or not Laffin, at the time of the transaction above alluded to, had in his hands the sum of \$1,900 in addition to said sum of \$2,339. 2. The question as to interest as affected by or dependent upon the alleged misconduct of Laffin in defeating a voluntary settlement between the parties.

We have attentively read the very elaborate statements and arguments of the respective counsel and duly considered them, with all the material evidence. The conclusion to which we have been brought is that, eliminating the incompetent testimony introduced on behalf of the appellants, the evidence fairly warrants the finding of the chancellor, that Laffin did not have in his hands said sum of \$1,900 or any other sum in addition to said \$2,339; that the failure in the matter of a voluntary settlement is not shown to have been the result of misconduct on the part of Laffin in such manner and degree as to affect the question of allowing or charging interest; and that the decree of the chancellor in that respect is substantially correct.

We find it wholly impracticable, on account of pressure of business, to give a more minute statement of the case or evidence, or to enter upon a discussion of the latter.

The points made against the decree not being sustainable upon the record, the decree will be affirmed.

Affirmed.

THE AMERICAN FIRE INSURANCE COMPANY,
V.
BRIGHTON COTTON MANUFACTURING COMPANY.

Fire Insurance—Finding of Court—Conflict of Evidence—Occupancy of Premises—Stoppage of Machinery for Repairs and Alterations—Practice.

1. The finding of the trial Judge, sitting in the place of a jury, must be taken by this court to be conclusive of questions of fact as to which the evidence is conflicting.

2. In an action on a policy of fire insurance, it is *held*: That the building in question was at no time within the period covered by the policy vacant or unoccupied; that the temporary stoppage or suspension of the operation of the factory for the purpose of making repairs and alterations was within the privilege granted by the policy; and that the judgment for the plaintiff is supported by the evidence.

[Opinion filed December 14, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

This was an action by appellee against the insurance company, appellant, upon a policy of insurance issued January 4, 1885, whereby the latter agreed to insure the former for the period of one year against damages or loss by fire, in amount not exceeding \$3,000, the policy covering the four-story brick cotton mill of the plaintiff, situated at Brighton Park, County of Cook, and State of Illinois, together with the machinery and fixtures therein contained, the declaration setting out the policy in words and figures, and averring the destruction of the building, machinery and fixtures by a fire occurring July 16, 1885, during the life of said policy. There was a trial, under proper pleadings, by the court without a jury; a finding of the issues for the plaintiff and assessing its damages at \$2,692.82; upon which the court, overruling the defendant's motion for a new trial, gave judgment, and the latter brings the case here by appeal.

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The provisions and conditions of the policy, so far as material to the questions involved, are as follows:

“Other insurance permitted without notice, and permission granted to set up and operate machinery, and to make such repairs and alterations as may be necessary to keep the premises in good order during the term of this policy, without prejudice thereto.”

(1) “Or if, during the existence of this policy or any renewal thereof, the risk shall be increased by any means whatever, with the knowledge of the assured, and the assured shall neglect to notify the company thereof and have the same endorsed hereon, paying therefor such additional premium as shall be demanded; (2) or shall allow the building to become vacant and unoccupied; * * * (3) or, if it be a manufacturing establishment, running in whole or in part, over or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed hereon, all insurance by this policy shall thereupon cease.”

Upon the trial, evidence was given tending to prove that the plaintiff was the owner of the factory and property in question, was in possession and was operating the same at the time said policy was issued, and so continued until May 1, 1885, when the plaintiff leased the entire premises to W. S. Baker and Thomas Kelly for the term of one year, at a rental expressed in said lease; that said Baker & Kelly immediately entered into possession of said premises under said lease for the purpose of operating said factory; that the fact of said leasing was promptly made known to the defendant, and the latter duly assented thereto, and manifested its assent thereto by an indorsement in writing on the back of said policy; that Baker & Kelly continued to operate said factory with profit to themselves, until about July 8, 1885, when, on account of difficulty just at that time in obtaining a desirable quality of cotton at suitable prices in the usual cotton markets, and for the purpose of making needed repairs as to the interior of said factory and its machinery, they decided upon a temporary suspension of the operation of said factory until about the first of the next succeeding month of August; that in pursuance of said deter-

mination, they, on said July 8, 1885, laid off their engineer, fireman, and most of their employes engaged in operating the spinning and batting machinery, but retained still in their employment a portion of the hands engaged in the dyeing department, and some connected with the packing room, for the purpose of preparing goods for the markets; that all, or nearly all of said employes so laid off were notified at the time that their services were dispensed with for the time being, but that the factory would soon be started again and that they would be notified when their services would be wanted; that arrangements were made on the contemplation of the part of Baker & Kelly for making the necessary repairs of the interior of the building and machinery, and the work went on in the building, under a sufficient number of employes, of preparing for market manufactured goods then on hand, so that such preparation was nearly completed by July 16, 1885, when the fire occurred; that between the time of such suspension and said fire, Baker & Kelly purchased about 100 tons of coal for use in the factory and had it stored therein; that they had there stock and materials for manufacture of the value of some \$7,000; that they were active in contracting for the sale of the manufactured goods to be delivered the next succeeding September; that they had a considerable sum of money in the office of the factory at the time of the fire, which had been provided for the payment of the wages of the then employes, who comprised from five to seven persons engaged, and being then all working hours down from the time of said suspension, including one of the proprietors and watchmen, to the time of such fire.

Upon the question whether such suspension increased the risk, the evidence was conflicting; but no evidence was offered tending to prove that it was with the knowledge of plaintiff, or any neglect on the part of the latter to notify the defendant thereof.

The defense relied upon by the defendant at the trial, and in this court, was and is that the policy in suit became void for a violation of each of the several conditions aforesaid.

Mr. E. H. GARY, for appellant.

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Messrs. EDWARD W. RUSSELL and D. J. SCHUYLER, for appellee.

McALLISTER, J. The leasing of the premises in question by the plaintiff below, to Baker & Kelly, after the policy in suit was issued, was expressly assented to by the defendant. No question, therefore, arises from that circumstance affecting the validity of the policy.

But counsel for the defendant contend as the sole ground of error that the stopping by Baker & Kelly of the operation of the factory from the 8th to the 16th day of July, 1885, although done for the purpose and in the manner as shown by the evidence, constituted a breach of each and all of three special conditions of the policy, and that by its express terms such breach rendered the policy void. So that the judgment below was against the law and the evidence, and should for that reason be reversed.

The first of those conditions is to the effect that if the risk should be increased by any means whatever with the knowledge of the assured, and the latter should neglect to notify the company thereof and have the same indorsed upon the policy, paying therefor such additional premium as should be demanded, the policy should be void.

That condition and the other two are to be taken and construed in connection with the following provision of the policy: "Other insurance permitted without notice, and permission granted to set up and operate machinery and to make such repairs and alterations as may be necessary to keep the premises in good order during the term of this policy without prejudice thereto."

The exercise of the privilege thus given involved the necessity, in a greater or less degree, depending upon circumstances, of a temporary stoppage of the operation of the factory. Such stoppage was therefore authorized by the policy, which, it in, terms provided, should be without prejudice thereto. Now the evidence tended to show that the stopping the operation of the factory was for the purpose of making needed repairs and alterations, which made such stoppage necessary. The

evidence upon the question, whether what was done in that behalf did in fact increase the risk, was conflicting, but the evidence tending to show the purpose of the suspension to have been within the intention of the clause last above quoted, was without any substantial conflict. Hence the finding of the trial Judge, sitting in the place of a jury, must be taken by this court to be conclusive upon those questions of fact. That is a complete answer to the position of counsel as to the alleged forfeiture of the policy, under the first special condition.

The second is, that if the assured should allow the building covered by the insurance to become vacant and unoccupied, the policy should thereupon become void.

The short answer to the contention of counsel for defendant, under that head, is, that their position is taken against the very truth of the uncontroverted testimony. The building was not at any time during the period in question vacant or unoccupied. This matter is so plain and clear upon the evidence as not to justify discussion, when we have so much in other cases that demands discussion and exhaustion of time and strength.

The third condition is in effect that if the property insured be a manufacturing establishment and it shall cease to be operated without special agreement indorsed on the policy, all insurance by this policy shall therefore cease.

The answer to the position of defendant's counsel that the stoppage of the operation of the factory, as shown by the evidence, constituted a breach of that condition and worked a forfeiture of the policy, seems to us to be readily at hand without going into any analysis of the numerous cases cited by them. The facts of the case must govern its decision, when they distinguish it from the cases decided by other courts. The law arises upon the facts.

It is indisputable that the evidence tends to show that the suspension of the operation of the machinery of the factory was designed to be only temporary; that one, if not the principal purpose of it, was to repair machinery and make alterations. The trial judge having found for the plaintiff on all the issues, we must, therefore, presume that he found those

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facts in accordance with the tendency of the evidence to prove them. So that here we must take them as the facts. That being so, what is there left of counsel's position that such stoppage or suspension constituted a breach of the condition of the policy under consideration? The policy gave express permission to make such repairs and alterations without prejudice to any rights under such policy. A temporary stoppage or suspension of the operation of the machinery, and while making such repairs and alterations, was such a natural and necessary incident of the exercise of the privilege granted, that it must have been within the contemplation of the parties at the time of entering into the contract. Such stoppage or suspension was therefore authorized by the policy to be effected without prejudice to any rights of the assured thereunder.

We think the judgment in this case was supported by the evidence that there was no prejudicial error of law. So that an affirmance is the proper result.

Judgment affirmed.

WILLIAM E. MASON

V.

BERNARD MANDL.

Practice in Justice Courts—Appeal—Affidavit—Affidavit of Claim—Time of Filing—Default.

Sec. 34, Chap. 79, R. S., providing for the filing of an affidavit of plaintiff's claim, does not authorize the Circuit Court to permit the filing of such an affidavit after an appeal taken from a Justice so as to confer upon the plaintiff the right to a default against the defendant and dismissal of his appeal for the mere want of an affidavit of merits.

[Opinion filed December 14, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. MASON & ENNIS, for appellant.

Messrs. BLUM & BLUM, for appellee.

McALLISTER, J. This was assumpsit, brought by appellee Mandl in Justice's court against appellant Mason and another defendant not served. Mason took an appeal to the Circuit Court, which was perfected November 20, 1886. The plaintiff, without notice to defendant, applied for and obtained, December 8, 1886, leave of court to file an affidavit of claim in the cause, which being filed, the court entered a rule upon defendant to file an affidavit of merits within five days after notice of such rule, and such notice was served on defendant December 10, 1886. Whereupon the defendant, December 15th, made a motion to vacate said rule, which was overruled and exception taken. But the court extended the time in which to file such affidavit of merits until the 20th of the same month.

December 21, 1886, on motion of plaintiff's counsel the court dismissed defendant's appeal for want of an affidavit of merits with a *procedendo*, and judgment for damages in the sum of \$6 was rendered against him, which the court refused to set aside on defendant's motion made in apt time; hence this appeal.

The record excludes the idea of the filing by the plaintiff of any affidavit in the Justice's court showing the nature of his claim, or of any purport whatever. The question therefore arises, whether it was competent for the Circuit Court on appeal to so authorize the filing of such affidavit there, as a first and original affidavit, as to confer upon the plaintiff the right to a default against the defendant and dismissal of his appeal for the mere want of an affidavit of merits by defendant.

Section 34 of the Justice's Act, 2 Starr & C. Ill. Stat., p. 1444, after declaring the plaintiff's right to a default in Justice's court against the defendant for want of appearance at the time of trial, contains this proviso:

"*Provided*, that if the plaintiff in any suit upon a contract, expressed or implied, for the payment of money, shall file with the Justice, *at the time of commencing such suit*, an affidavit

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showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just deductions, credits and set-offs, if any, he shall be entitled to judgment in case of default, but the Justice may require further evidence. *Provided further*, that in cases of appeal from the judgment of the Justice of the Peace as aforesaid, *such affidavit* shall have the same force and effect in the Appellate Court as if such suit had been commenced in such Appellate Court."

The expression "*such affidavit*," used in the second proviso, can have no reference to any other than the affidavit filed "*at the time of commencing such suit*," mentioned in the former of said provisos. And to give to the language employed a construction authorizing the filing of an original affidavit of claim in the Appellate Court with the effect which the learned Judge of the Circuit Court awarded to it, would be not only against the clear and unambiguous wording of the statute, but against the manifest intention of its framers.

The statute above quoted shows that the attention of the Legislature was called to the subject. And if it had been thought fit to authorize the filing of an affidavit of claim for the first time in the Appellate Court it would have been easy to have so enacted; and not having done so, the inference is that it was not deemed proper to extend the practice that far. *Booth v. Storrs*, 54 Ill. 472, 480, and cases cited.

For the error in taking the defendant's default for want of affidavit of merits, and refusing to set the same aside on defendant's motion, the judgment will be reversed and the cause remanded.

Judgment reversed.

In re Geohegan.

IN RE WILLIAM S. GEOHEGAN ET AL.

Voluntary Assignments—Judgments by Confession—Whether a Valid Preference—When Such Preference is Given.

1. Until he has made up his mind to make an assignment, a debtor retains the dominion over his property and may sell, mortgage or pledge it, or create a lien upon it by confessing a judgment in favor of a *bona fide* creditor.
2. A preference is given to a creditor, so far as the debtor is concerned, not by entry of the judgment but by the execution of the warrant of attorney. If that instrument is given at a time when the debtor may lawfully prefer a creditor, the preference is valid.
3. Under the statute of this State the creditor will be protected if he in fact succeeds in perfecting his lien before the assignment becomes operative. Knowledge of the insolvency of his debtor, or of his intention to make an assignment, or of his being actually engaged in the execution of such instrument, can not deprive him of his preference, if he in fact succeeds in obtaining one.
4. Mere non-action on the part of the debtor until the creditor has perfected his lien, does not make the procuring of such lien his act. The statute imposes upon him no duty of diligence to defeat the priority of creditors who hold valid warrants of attorney.
5. Upon a petition to have certain executions against the property of an insolvent debtor vacated and to have said executions and the judgments on which they were issued declared to be a part of the general assignment, it is held: That there is no evidence of such active co-operation on the part of the debtors in the entry of the judgments by confession as to make them their acts; that the liens are therefore valid; and that they do not constitute an illegal preference within the meaning of the statute.

[Opinion filed December 14, 1887.]

IN ERROR to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

MESSRS. ABBOTT & BAKER, for plaintiff in error.

MR. FRANK P. LEFFINGWELL, for defendants in error.

The entry of the judgments by confession and the delivery

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of the executions to the Sheriff, were a fraud upon the assignment law. *Hahn v. Salmon*, 20 Fed. Rep. 801, and cases cited; *Preston v. Spaulding*, 10 N. E. Rep. 911; *Sartwell v. North*, 10 N. E. Rep. 824; *Wilson v. City Bank*, 17 Wall. 473, 487; *Buchanan v. Smith*, 16 Wall. 307.

The entry of the judgments, levying of the executions and making of the deed of assignment must be construed to be part and parcel of the same transaction. *Preston v. Spaulding*, 10 N. E. Rep. 903, and cases cited; *Berry v. Cutts*, 42 Me. 445; *Perry v. Holden*, 22 Pick. 269, 275; *Holt v. Bancroft*, 30 Ala. 193, 200; *Livermore v. McNair*, 34 N. J. Eq. 478, 482.

The rule in construing a remedial statute, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it. *C. B. & Q. R. R. Co. v. Dunn*, 52 Ill. 260.

The law will not permit that to be done indirectly which can not be done directly. That which violates the policy of a statute is as much condemned as if it violated the latter. The law no more tolerates an evasion of a statute by artifice than a palpable violation of it. *Holt v. Bancroft*, 30 Ala. 193, 300. See also, *Livermore v. McNair*, 34 N. J. Eq. 478, 482; *U. S. v. King*, Wall. C. Ct. 13; *Downing v. Kintzwig*, 2 Serg. & R. 335; *Oates v. First Nat. Bk.*, 100 U. S. 239.

BAILEY, J. This was a petition in a proceeding in the County Court under the statute in relation to voluntary assignments, praying that the liens of certain executions against the property of the insolvent debtors be vacated, and that said executions and the judgments upon which the same were issued be declared to be a part of the general assignment for the benefit of creditors. Said petition was denied by the County Court, but upon appeal to the Circuit Court a hearing was had and an order entered against the prayer of the petition, and the record comes here by writ of error.

On the 1st day of December, 1885, the firm of W. S. Geohegan & Company, consisting of William S. Geohegan, Harry Geo-

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hegan and Thomas Fitch, then doing business as merchants in Chicago, executed three judgment notes maturing thirty days after date, one for \$200 payable to the order of Joseph H. Fitch, one for \$703.89, payable to the order of Sarah A. Geohegan, and one for \$2,137.30, payable to the order of Eliza J. Geohegan, the warrant of attorney accompanying each note authorizing the entry of judgment by confession at any time after said date for the amount of the note, attorney's fees and costs. As to the *bona fides* of the indebtedness for which said notes were given, no question is raised, and the evidence shows beyond controversy that, at the time said notes were given, said firm, though somewhat embarrassed, had not determined to make an assignment, and were not in fact contemplating any such step.

It appears that the creditors to whom said notes were given were all relatives of the members of said firm; Sarah A. Geohegan being the mother of William S. and Harry Geohegan, Eliza J. Geohegan the widow of their deceased brother, and Joseph H. Fitch the husband of their sister and a brother of Thomas G. Fitch, the third member of the firm. Shortly after the execution of said notes, Sarah A. Geohegan placed her note in the hands of Joseph H. Fitch, who was an attorney at law, for collection when due, and Eliza J. Geohegan also placed her note in his hands for collection shortly after its maturity. Joseph H. Fitch had several interviews with the members of the firm in relation to the payment of the notes and was put off until the 5th or 6th of January, 1886, when he told Harry Geohegan that unless the notes were paid, he would cause judgments to be entered thereon. Harry Geohegan, finding Fitch determined to proceed at once to enforce the collection of the notes, had a long talk with him in which he disclosed fully the situation and financial condition of the firm, from which it appeared that the firm was insolvent and would be unable to continue longer in business, and he thereupon asked Fitch, who, as it seems, had been to some extent, the legal adviser of the firm, to advise him as to what, under the circumstances, would be the best course for the firm to pursue. Fitch replied, that in his opinion a

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general assignment for the benefit of creditors was the only course open to them, but at the same time said that they should employ another lawyer, as he, Fitch, could not properly represent both them and the creditors at the same time. This, as it seems, was the first time that the subject of an assignment was suggested by any of the parties. Geohegan, on leaving, said that he would consult with his partners, but expressed the opinion that the firm would not make an assignment, as some of the partners had a strong prejudice against the mode of procedure. The firm, however, consulted another attorney, and as the result of such consultation, they determined to make a general assignment, and Harry Geohegan procured certain blanks to be used in the preparation of such a document. On the evening of January 7th, Fitch drew up all the papers necessary for the entry of judgments on the three notes, leaving blanks only for the name of the attorney who was to sign the cognovits. Harry Geohegan and Thomas G. Fitch were living in the same house with Joseph H. Fitch, and on the same evening they went to his room taking said blanks with them, and told him of their determination to make an assignment; he also at the same time telling them that he should enter up judgments on the notes the first thing the next morning, and that everything was in such shape that he would get his executions before they could possibly make their assignment. At this interview Harry Geohegan produced the blanks which he had procured, and Joseph H. Fitch, at his request, filled up in part both the assignment and the schedules. Fitch testifies that in doing this he acted not as the attorney of the firm, but as a mere amanuensis for the partners, and for the reason that he was the best penman present.

The next morning Harry Geohegan, Thomas G. and Joseph H. Fitch and Sarah A. and Eliza J. Geohegan met, in pursuance of a previous arrangement, at the office of Abbot & Johnson, the attorneys for said firm, and there the assignment drawn up the previous evening, and also the declarations and cognovits prepared by Joseph H. Fitch were produced. Just before 10 o'clock said Fitch, who at the time was acting as minute clerk

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in the County Court, and for that reason could not attend to the entry of the judgments in person, handed the declarations and cognovit to Mr. Johnson, one of the attorneys acting for said firm in the matter of the assignment, and asked him to go to the Superior Court as soon as it should be opened, and cause the judgments to be entered and executions thereon to be issued and delivered to the Sheriff. In accordance with this request said Johnson went to the court house, caused the judgments to be entered in the Superior Court, took out executions and placed them in the Sheriff's hands. At the time he left his office the assignment appears to have been completed with the exception of the signatures of the members of the firm, and at that time William S. Geohegan, one of the partners, had not arrived. The evidence also tends to show that the execution of the assignment was delayed by an attempt by the firm to arrange with a certain creditor, in whose hands they had placed collaterals for the payment of the indebtedness, so as to get the collaterals back into their own hands. The executions came into the Sheriff's hands at 10:25, 10:26 and 10:27 A. M., and the assignment was executed and recorded at 11 o'clock A. M., the same day. There is evidence tending to show that it was the expectation of all the parties that the execution should take the precedence of the assignment, and that it was the intention of the members of said firm to record the assignment as soon as possible, after the entry of the judgments, so as to prevent the levy of intervening attachments.

The question arising upon the foregoing facts is, whether said judgments and executions and the lien thereby acquired are to be deemed in law a part of the assignment, or are to be regarded as a separate transaction wholly independent of the assignment, and in no way affected thereby. If they are a part of the assignment, they constitute an unlawful preference within the meaning of Sec. 13 of the statute in relation to voluntary assignments for the benefit of creditors, and said liens are consequently void.

The law is now settled in this State that, after a debtor has determined to make an assignment for the benefit of his creditors, all conveyances, transfers or other dispositions of his

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property or assets, made in view of his contemplated general assignment, whereby any preference is given, will be held to be a part of the assignment, and therefore void under the 13th section of the statute in relation to voluntary assignments for the benefit of creditors, the same as though incorporated into the deed of assignment itself. *Preston v. Spaulding*, 120 Ill. 208. But while this is so, the rule is also settled that the debtor, until he has made up his mind to make an assignment, retains the dominion over his property, and may sell, mortgage or pledge it, or create a lien upon it by operation of law, as by confessing a judgment in favor of a *bona fide* creditor.

Under the foregoing rule, there can be no doubt of the validity of the notes and warrants of attorney by virtue of which the judgments in question were confessed. They were given to secure *bona fide* debts at a time when the debtors were not contemplating an assignment. A warrant of attorney is a well known and well recognized security, and the warrants of attorney in question, as soon as they were executed, became, in the hands of the payees of said notes, securities for the debts for which the notes were given, of which said payees were entitled to avail themselves, and which the debtors had no power, by any act of theirs, to set aside or impair. With the entry of a judgment by virtue of a warrant of attorney, the debtor has nothing whatever to do. It is the act of the creditor alone. He and not the debtor has the right to determine when the judgment shall be entered up, and to set on foot the proceedings necessary to have it entered. Such entry is as to the debtor a proceeding *in invitum*, and even if he gives to it the express consent, it becomes his act no more than before.

In *Clark v. Iselin*, 21 Wall. 360, where the question was whether the entry of a judgment by virtue of a warrant of attorney, given before the insolvency of the debtor, constituted an illegal preference within the prohibition of the 35th section of the Bankrupt Act, the court say: "Now, in a case where a creditor, holding a confession of judgment perfectly lawful when it was given, causes the judgment to be entered of record, how can it be said the debtor procures the entry at the time

it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was perfectly solvent. But no consent is given when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained by him when his confession is placed on record. Such an assertion, if made, must rest on a mere fiction."

The 35th section of the Bankrupt Act provided, in substance, that if any person, being insolvent or in contemplation of insolvency, within four months before the filing of a petition by or against him, with a view to give a preference to any creditor, procured or suffered any part of his property to be attached or seized on execution, such creditor having reasonable cause to believe such person to be insolvent, and that such levy was made in fraud of said act, such levy should be void. In *Clark v. Iselin*, *supra*, a creditor obtained from his debtor while solvent a paper known as a "confession of judgment," equivalent to a warrant of attorney, and kept it in his possession until his debtor became insolvent, and then, with knowledge of such insolvency, entered judgment thereon, and caused the property of his debtor to be seized on execution, and it was held that the levy was valid, and was not a procurement by the debtor of a seizure of his property with a view on his part to give a preference to his creditor, within the meaning of the Bankrupt Act. This conclusion was reached upon the theory that the preference was given, so far as the debtor was concerned, not by the entry of the judgment, but by the execution of the warrant of attorney, and as that instrument was executed at a time when the debtor might lawfully prefer a creditor, the preference was not illegal.

It should be observed that our statute in relation to voluntary assignments is much less sweeping in its provisions than the Bankrupt Act. Under our statute a debtor, though con-

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templating insolvency or actually insolvent, may lawfully prefer a creditor, such preference being forbidden only when it is made at such a time and under such circumstances as to become, in legal contemplation, a part of the assignment itself. In other words, it is only such preferences as are made after the debtor has determined to execute a general assignment of his property for the benefit of his creditors, that are illegal and void. Unlike the Bankrupt Act also, our statute makes no attempt to regulate the conduct of the creditor. See *Preston v. Spaulding, supra*. His acts, whatever they may be, done with a view of securing a preference, and his knowledge of the insolvency of his debtor, or of his intention to make an assignment, or of his being actually engaged in the execution of such instrument, can not deprive him of his preference, if he in fact succeeds in obtaining one. He may choose his own time for entering up his judgment, and if he succeeds in perfecting his lien before the assignment becomes operative, his legal priority is established.

But it is said that the priority of the creditors' lien in this case was brought about, in part at least, by the collusion or connivance of the debtors. Such collusion or connivance, so far as it possesses any legal significance, consisted in a willingness or it may be a desire on the part of the debtors that the creditors' lien should precede the assignment, and the timing of the execution of the assignment so as to make it subsequent to such liens. If it be admitted that the debtors purposely delayed their assignment until the creditors had entered up their judgments and taken out executions, what are the legal consequences? The statute imposed upon the debtors no duty of diligence to defeat the priority of creditors who had valid warrants of attorney. They were under no obligation to enter upon a race of diligence with such creditors, but were only restrained from giving a preference by any affirmative act of their own. Mere non-action on their part until the executions should become liens, did not make the procuring of the liens their act. It was the act of the creditors, and was a lawful exercise of the power given to them at the time the warrants of attorney were executed, and long before any assignment

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was contemplated. We do not say that there may not be such active co-operation on the part of a debtor in the entry of a judgment by confession as to make such judgment in legal contemplation his act, but such co-operation must involve something more than mere delay, or even notice to the creditor that an assignment is contemplated. In this case we find no evidence of such co-operation, and we therefore hold that the liens of the executions are valid, and that they do not constitute an illegal preference within the meaning of the statute. We are of the opinion that the Circuit Court erred in coming to the opposite conclusion, and the judgment will therefore be reversed and the cause remanded, with instructions to the Circuit Court to affirm the judgment of the County Court.

Judgment reversed.

FRANK J. BOWMAN

V.

IDA M. BOWMAN.

Divorce—Alimony Pendente Lite—Common Law Marriage—Sufficiency of Proof—Jurisdiction—Domicile.

1. A common law marriage is a marriage "contracted and solemnized" within the meaning of our statute authorizing divorce.

2. To constitute a marriage *per verba de presenti* no particular words are necessary. It is sufficient if what is done and said evidences a present assumption by the parties of the marriage status.

3. Where, in an application for alimony *pendente lite*, the fact of marriage is practically the only point in issue, the proof required should only extend to probable cause, or a fair probability that the petitioner will maintain her allegation.

4. A married woman may be an actual resident of this State though she has no domicile here, and if while she is such actual resident, the offense which supplies the ground of divorce is committed, thereafter her actual residence becomes her separate and legal domicile.

5. In the case presented, it is *held*: That the evidence of a common law marriage furnishes proof sufficient to authorize the court to grant alimony and suit money *pendente lite*; and that the court below had jurisdiction under the statute.

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[Opinion filed December 14, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. L. M. SHREVE, for appellant.

Courts of equity will rarely, if ever, allow either alimony or solicitor's fees where the marriage is squarely controverted, and never until a *prima facie* case is made, establishing the right and overcoming the husband's allegation of facts impairing the validity of the marriage.

The indiscriminate allowance of alimony would enable the adventuress and blackmailer to prosecute her suit by the same agency which the chancellor may give an injured and innocent wife, when it is just and equitable. *Collins v. Collins*, 71 N. Y. 269, 275; *York v. York*, 34 Iowa, 530; *Lovett v. Lovett*, 11 Ala. 769, 777.

Whether alimony shall be granted is a matter of law; how much is a matter of discretion. *Wetsell v. Wetsell*, 8 B. Mon. 50; *Call v. Call*, 45 Me. 407.

And this discretion is a judicial, not an arbitrary one. *Foote v. Foote*, 22 Ill. 425; *Foss v. Foss*, 100 Ill. 576, 580; *Deenis v. Deenis*, 79 Ill. 74; *Blake v. Blake*, 80 Ill. 523.

If it appears that the parties are not married, or that the complainant is acting in bad faith, alimony *pendente lite* will not be granted. *Collins v. Collins*, 71 N. Y. 269, 275.

No presumption of marriage can be indulged by the court, for it is admitted that illicit cohabitation existed for years between the parties, and every such presumption is overcome by prior illicit cohabitation, which is presumed to be continued. *Hibblethwaite v. Hepworth*, 98 Ill. 126.

A promise to marry when promisor gets a divorce from his wife, is void. *Naice v. Brown*, 39 N. J. 133; *Padock v. Robinson*, 34 N. Y. 643. No court can grant a divorce except for causes provided by statute. *Cook v. Cook*, 56 Wis. 600; *U. S. v. Hayes*, 20 Fed. Rep. 710.

When jurisdiction has been so given by the law making power for certain specified causes, as in the State of Illinois, it excludes all other causes for divorce.

Our Supreme Court, conceding that such a marriage may be valid for certain purposes, has been reluctant in extending the *ægis* of the law to marriages usually known as common law marriages, even in cases of inheritance, dower and legitimacy. *Hebblethwaite v. Hepworth*, 98 Ill. 126.

The domicile of the husband is the domicile of the wife. His residence is hers, and from the 27th day of June, 1886, to the 5th of September, under the averment in the bill she was in legal contemplation a resident where her husband resided, at St. Louis, Missouri. *Ashbaugh v. Ashbaugh*, 17 Ill. 476; *Davis v. Davis*, 30 Ill. 180; *Kennedy v. Kennedy*, 87 Ill. 250.

Messrs. CASE & HOGAN, for appellee.

The law favors a presumption of marriage arising from evidence of an agreement between the parties. The extent of the rule is that where a cohabitation is illicit in its origin, a mere continuance of the cohabitation, under the same circumstances, a simple prolongation of the unlawfulness will not change its character. And yet the court will seize hold of the slightest circumstances indicating a change in their relations, and draw inferences favorable to matrimony. *Fenton v. Reed*, 4 Johns. 52; *Senser v. Baur*, 1 Penny. 452; *Rose v. Clark*, 8 Paige, 574; see especially, *Yates v. Houston*, 3 Texas, 450. See, also, *Donnelly v. Donnelly*, 8 B. Mon. 113.

Where the parties have manifested a desire to live in a matrimonial union, which the parties in this cause did upon their removal to Chicago, and not in a state of concubinage, and during their cohabitation there has been a time when they might lawfully have married, a jury will be justified in finding a marriage from the mere fact of continued cohabitation apparently matrimonial, although it was for some reason meretricious in the inception. The following authorities fully sustain this proposition: *Fenton v. Reed*, 4 Johns. 52; *Van Buskirk v. Claw*, 18 Johns. 345; *Rose v. Clark*, 8 Paige, 574; *Caujolle v. Ferrie*, 23 N. Y. 90; *Betsinger v. Chapman*, 88 N. Y. 487 to 499; *Hynes v. McDermott*, 91 N. Y. 451; *Holabird v. Atlantic Ins. Co.*, 12 Am. L. R. (N. S.), 566; *North v. North*, 1 Barb. Ch. 241; *Starr v. Peck*, 1 Hill, 270; *Donnelly*

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v. Donnelly, 8 B. Mon. 113; Blanchard v. Lambert, 43 Iowa, 228; State v. Worthingham, 23 Minn. 528; Dickerson v. Brown, 49 Miss. 357; Floyd v. Calvert, 53 Miss. 37-46; Jones v. Jones, 45 Md. 155; Yates v. Houston, 3 Texas, 433-450; Campbell v. Campbell, 1 Law Rep. (H. L.) Secs. 182, 201, 204, 212, 215; Breadalbane's Case, L. R., 1 Scotch Divorce Appeals, 182; De Thoren v. Attorney General, L. R., 1 App. Cas. 686; *In re Taylor*, 9 Paige, 611.

We think the following rules may be deduced from the cases cited:

1st. That an illicit connection is presumed to continue until there is evidence to the contrary.

2d. That where the parties have manifested a desire to form a matrimonial union, the presumption will be rebutted so as to make the question one of fact, by the slightest circumstance, and that a mere continuance of the cohabitation without any apparent change after the parties have the right to contract a valid marriage, will suffice to justify submission of the question of marriage to a jury, and the court should, under such circumstances, submit the question to the jury.

3d. That where there is any evidence even of the slightest character to rebut this inference of continuance of an illicit union, the question is one of fact.

The cases are unanimous in support of the true doctrine that where the evidence discloses the fact that the parties desired a matrimonial instead of a meretricious connection the slightest circumstance should be held to afford sufficient evidence upon which to predicate a finding of marriage.

Where a presumption of marriage has once arisen from a cohabitation apparently matrimonial, it can be overthrown only by the most cogent proof. *Hynes v. McDermott*, 91 N. Y. 451; *Morris v. Davies*, 5 Cl. & Fin. 163; *Piers v. Piers*, 2 Il. L. Cas. 331.

The defendant in error in this case bases her right for divorce not solely upon cohabitation and repute, but on a contract of marriage entered into between the parties hereto, after the divorce of the plaintiff in error, followed by a cohabitation and assumption of the marriage *status*. The law on that point is

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clearly stated by the Supreme Court in the late case of Cartwright v. McGown, 10 West. Rep. 592.

In the case at bar it was not necessary that there should have been a marriage ceremony; all that was required, and this was done, was a mutual agreement between themselves to live permanently in matrimonial relations. Consent and not ceremony made the marriage. The contract and not the evidence of it constitutes the marriage.

At common law, as held in this country, and until recently it would seem as generally understood in England, persons of suitable age might, by words of present consent, contract a valid marriage without the presence and intervention of a minister, and without any particular form of solemnization. A statute may, of course, take away this common law right, but this is not to be presumed. The right is not conferred by statute, but exists independent of it, and therefore it is held that the rule does not apply, that when a statute directs a thing to be done in a particular way, it is void if done in any other way. The forms required are directory and not prohibitory, and such statutes have always been construed as not rendering void marriages entered into without the observance of those forms. Port v. Port, 70 Ill. 484; Hebblethwaite v. Hepworth, 98 Ill. 129.

This is an appeal from the interlocutory decree only. We submit that a *prima facie* case was made out in the Circuit Court, and the court, as it had full power to do with or without statutory authority, granted alimony and solicitor's fees. McGee v. McGee, 10 Ga. 478; Dow v. Eyster, 79 Ill. 254; Griffin v. Griffin, 47 N. Y. 134; Perry v. Perry, 2 Paige, 504; Chairs v. Chairs, 10 Fla. 308.

The complainant at the time she filed the bill was an actual resident of the City of Chicago and County of Cook, and had been for more than one whole year past a resident of the State of Illinois. She became so at the request of the plaintiff in error, and he never solicited her to come to St. Louis, Mo., and live with him, but stated that he would come to Chicago and live with her. The adultery complained of in the bill was committed outside of the State of Illinois. In such a case the court will

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have jurisdiction even though the residence in this State has not been for one whole year. *Way v. Way*, 64 Ill. 406. She was actually a resident of this State at the time the adulteries were committed by the plaintiff in error. It then confessedly follows that her then actual place of residence became her legal and separate domicile. *Hopkins v. Hopkins*, 15 N. H. 474; *Dutcher v. Dutcher*, 39 Wis. 651; *Way v. Way*, *supra*; *Pate v. Pate*, 6 Mo. Appeals, 49.

MORAN, P. J. This is an appeal from an order allowing suit money and alimony *pendente lite* to appellee in her suit to obtain a divorce from appellant on the ground of adultery.

She alleged in her bill that she was lawfully married to appellant on June 27, 1886, and it appears from the statements of her affidavits, filed in support of her motion for alimony, that the marriage claimed by her to have been entered into, was what is known as a common law marriage. Appellant's objections to the decree are:

1st. That a common law marriage is not such a marriage as the Legislature of this State has authorized the courts to dissolve by divorce, such a marriage not being one "contracted and solemnized," within the meaning of the statute on divorce.

2d. That in this case there is not evidence sufficient to prove a marriage in fact, and that therefore no order for alimony should have been made.

3d. That if there was a marriage in fact, then complainant on her marriage lost her domicile in this State, and took that of her husband, who is shown to be a resident and citizen of Missouri, and therefore the court in this State has no jurisdiction.

We will consider these objections in their order:

1st. While the statute of this State on marriage does provide that marriages may be celebrated by certain ministers and officers, and requires a license, and imposes a penalty upon any such minister or officer as shall celebrate a marriage without a license therefor having first been obtained, yet the forms required are directory and not prohibitory, and such statutes have always been construed as not rendering void marriages entered into without the observance of those forms.

In *Port v. Port*, 70 Ill. 484, it is said by the Supreme Court: "We are inclined to the opinion, supported as it is by the statements of many of the most eminent text writers, as well as by the decisions of courts of the highest respectability, that, inasmuch as our statute does not prohibit or declare void a marriage not solemnized in accordance with its provisions, a marriage without observing the statutory regulations, if made according to the common law, will still be a valid marriage, and that, by the common law, if the contract is made *per verba de presenti*, it is sufficient evidence of a marriage." Also *Hebblethwaite v. Hepworth*, 98 Ill. 126.

If the marriage is valid it is indissoluble by the parties to it. They are by such marriage inseparable—man and wife. If, therefore, the contention of appellant that the courts of this State have jurisdiction to divorce parties only whose marriage was "contracted and solemnized," in accordance with the forms prescribed by the statute, that is, ceremonial marriages, then it follows that we may have a class of persons in this State who are validly married, whose children are legitimate, who legally enjoy all the rights and are bound by all the duties and obligations of the marriage contract, and who have no right to seek redress in the form of a divorce for violation of the contract; and this is a community where, in law, marriage is regarded as a civil contract or civil *status* merely, where it has, in view of the State, no sacramental character, and where it needs no ecclesiastical sanction.

We are of opinion to so hold would be against public policy, as it has been established by the legislation and common law of this State.

Even in England, where to constitute a valid and complete marriage it was necessary that it be made in the presence and with the intervention of a minister in orders, it was held that persons who had entered into a contract of marriage which amounted to no more than a marriage *per verba de presenti*, was valid to the extent that entitled a party to it to come to the consistory court for divorce. The Judge there said that he would hold in that "and all similar cases, that when there has been a fact of consent between two parties to become man

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and wife, such is sufficient marriage to enable me to pronounce, when necessary, a decree of separation." *Catterall v. Catterall*, 1 Rob. 580.

In *Harman v. Harman*, 16 Ill. 85, though the exact point urged here was not under consideration, it is said in the opinion: "I apprehend a mere *de facto* or cohabitation marriage may be dissolved by decree."

It is suggested that this is mere *dictum*, as the marriage pleaded in that case, and admitted by the default, would be intended to be a marriage "contracted and solemnized" as required by law. But, if a *dictum*, the statement is in accord with the almost universal course of the courts in this country, for no case is to be found where the relief asked was refused on the ground that the marriage was a common law marriage.

We think the word "solemnized," as used in our statute, is not to be construed as meaning only a ceremonial solemnization, whether religious or official, but that for the purpose of divorce a marriage may be self-solemnized by the parties to it, and a contract between them which constitutes them man and wife is a marriage "contracted and solemnized" within the meaning of our statute authorizing divorce.

2d. Is a marriage in fact proved against the parties? As the case is presented, the marriage is the only fact in dispute between the parties. Appellee alleges in her bill that she was married to the appellant on the 27th of June. The bill is unanswered, and while there is no default entered against appellant, there is no issue made by the pleadings as to the alleged marriage.

In her affidavit in support of the motion for alimony *pendente lite* and suit money, appellee swears "that on the 27th day of June, 1886, the said defendant informed this affiant, the said Mary V. Bowman [appellant's former wife] had obtained a divorce from the said defendant in one of the courts of the City of St. Louis, and that he was then a free man and would marry this affiant. This affiant then requested the said defendant to marry this affiant, when said defendant said that he did not believe in marriage ceremonies, and that he would make her his wife in the presence of a witness, which he accordingly did on the said 27th day of June, A. D. 1886."

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In another affidavit, subsequently made and filed in the same matter, she swears "that the said defendant did, on the 27th day of June, A. D. 1886, marry this affiant, and said defendant stated on that day to this affiant that he then and there would, as he then did, fulfil the numerous and repeated promises which he had been constantly making this affiant for months and years prior to his divorce. That on the last said day the said defendant stated to this affiant that he was the father of her children and would legitimize them, as he then did by marrying this affiant. Defendant also stated, on the last said date, to this affiant, that he was free then to make the children legally his, and for that reason, as well as his very great love for this affiant, did make this affiant then and there his wife."

These statements of appellee are controverted by appellant in two affidavits filed by him in said case. In his first affidavit he swears "that he was not, on the 27th day of June, 1886, in the City of Chicago, lawfully married to the plaintiff, and says that neither at Chicago on the date last mentioned, or at any other time or place, was the plaintiff in the above named cause married to the said defendant; and affiant further states and says, that he did not live and cohabit with the plaintiff in the above named cause from the 27th day of September, 1886, as husband of the plaintiff, and affiant says that each and every of the plaintiff's allegations of and concerning a marriage with the defendant as in her petition in this cause set forth and stated are wholly untrue."

In the second affidavit he says, "that he did not at 202 Webster Avenue, Chicago, enter into a contract of marriage to take effect at that time with the person who calls herself Ida M. Bowman, as in her affidavit stated, and that it is not true that he made her his wife in the presence of a witness on the 27th day of June last, or at any other time, and the statement so made is false and untrue."

It will be observed that appellee says in her affidavits that appellant made certain statements to her on the 27th day of June. That he stated to her that he was then free; that he would fulfil the repeated promises which he had been making prior to his divorce; that on said last named date he "stated

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to this affiant that he was free then to make the children legally his, and for that reason, as well as his great love for this affiant, did make her then and there his wife." Appellant's affidavits do not contain an unequivocal denial of what appellee states. He first says he was not lawfully married to her at Chicago on June 27th or at any other time or place, and that each and every of her allegations, concerning a marriage, in her petition set forth and stated, are untrue. This is a mere denial, not of the facts, but of her conclusion from the facts. His second affidavit does not deny that he stated to her the matter which she swears to, but says that he did not at 202 Webster Avenue enter into a contract of marriage to take effect at that time as in her affidavit stated, and that he did not make her his wife in the presence of a witness on the 27th day of June or at any other time. Here is no denial that he stated to her the words which she swears in her affidavit he did state. It is as though he should say I do not deny that I made the statement sworn to, but I do deny that I was lawfully married, or that I made her my wife in the presence of a witness.

When it is remembered that appellant is a lawyer, and as we understand, drew his own affidavits, these equivocal denials gain additional significance.

But treating the affidavits as flatly, though inartificially, controverting the statements of appellee with regard to the marriage, there are statements of hers which are wholly denied, and circumstances in the case practically admitted, which we think lend corroboration to her assertion of the marriage. It appears that an illicit relation commenced between appellant and appellee in the City of St. Louis, when appellee was only sixteen years of age, appellant being at that time a practicing lawyer and having a wife living. During the continuance of the relations of the parties at St. Louis two children were born to them and appellee states that appellant repeatedly promised that he would marry her as soon as he should be divorced from his then wife. Appellant does not deny that he made such promises.

Appellee swears that she moved to Chicago at his request,

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and that after coming to Chicago, she, at his suggestion, called herself Ida M. Bowman so that when he married her the change of name would not be noticed. That she was always known in St. Louis by the name of Ida M. Clement.

These statements are not denied by appellant. Appellee has attached to her affidavit copies of letters and of a telegram. The telegram, which is dated the day after the divorce from his wife was granted and addressed to Mrs. I. M. Bowman, is: "My case is decided, decree granted, expect me Sunday morning." A letter of the same date, which announces that he is free! free!! and mentions the divorce, says: "You may expect to see me Sunday morning although it will be hard for me (I have traveled so far and so fast) to take the ride if I have to come back Sunday night; but I am so anxious to see you I will come if I can stay but for a day." This telegram and letter are not denied, and appellant admits that he did come to Chicago to see appellee on the Sunday mentioned, and that is the day on which she claims that he married her as detailed in her affidavit. He needed no freedom to meet her in continuance of the impure relation. As between them it was important only as permitting him to enter at once upon a pure one.

There are also letters from appellant to appellee after the date of the alleged marriage, which, while they are not verbally inconsistent with the theory of continued meretricious relations between the parties and the contemplation by him of a marriage to be entered into with appellee in the future, seem to us to be on the whole more consistent with the theory that appellant and appellee were married, and were soon to live together in the permanent enjoyment of that relation.

There are other circumstances shown in the affidavits filed, some of which make for and some against the theory of a marriage, but we do not regard any of them as of sufficient weight to modify the conclusion which, in view of the entire record, we feel compelled to draw from the facts above detailed. We are of opinion that the evidence furnishes proof of a marriage sufficient to authorize the court to grant suit money and alimony *pendente lite*. To constitute marriage *per verba de presenti* no particular words are necessary. If what is done and

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said, evidences a present assumption by the parties of the marriage *status*, that is sufficient whatever may be the form of expression used. Stewart on Marriage & Divorce, Sec. 86.

The statements which appellee swears were made by appellant on the 27th day of June, when all impediments to a marriage between them had been removed, were sufficient to constitute a valid marriage between them, and while, for the purpose of this discussion, we treat appellant's evasive denial of the marriage as denials of the facts stated by her, we find in the fact of the promises of marriage made during the meretricious relation and in the immediate seeking of her upon the granting of the divorce and hailing her triumphantly with the statement of his freedom, circumstances which go far to render her claim of a marriage on June 27th probable.

This probability is strengthened by the natural presumption that a man who has sustained to a woman a libidinous relation and has children born in said relation whose paternity he acknowledges, and for whom he expresses affection and love (as appellant most profusely does in his letters to appellee), will seek the earliest moment after all impediment is removed to free his children from the stain of illegitimacy, and to convert the impure relation with their mother into one at once legal, honorable and respectable. It is to be remembered too, that upon this interlocutory motion, the question of marriage or no marriage is not definitely settled.

While in an application for alimony the fact of marriage, if denied, must be proved, yet where it is practically the only fact in issue on said motion as it is in this case, the proof should not be required to go beyond establishing probable cause, or a fair probability that the petitioner will maintain her allegations.

As was said by the New York Court of Appeals in Brinkley v. Brinkley, 45 N. Y. 184, when considering this question: "If there has been a binding contract of marriage, it is of public as well as private interest that it be shown and maintained. It is evident from what is before us that it can be shown and maintained only by professional skill and vigor, to secure which to the plaintiff pecuniary means are needed. She is without such means, and if the defendant is her husband he should provide them."

We are of opinion that, considering the fact that there is no answer to the bill, the record furnishes sufficient proof of marriage to authorize the court to enter the order for support and suit money, to enable appellee a fair opportunity to maintain her allegation on the final hearing.

3d. Had the complainant at the time of filing her bill such a residence in the State as entitled her to sue here for a divorce. The bill alleges that she is an actual resident of the City of Chicago and of the County of Cook, and is now and has been for one whole year last past, a resident of the State of Illinois, and that she was married to the defendant in Chicago, in June, 1886.

The bill does not state where the defendant resides, but does state that he is and has been for some years practicing law in the City of St. Louis. It is further alleged in the bill that in July and August succeeding the marriage, the defendant committed adultery in Washington, and that at divers times subsequent to the marriage and prior to September 5, 1886, he committed adultery in St. Louis. The bill was filed in January. Though the jurisdictional facts are rather bunglingly stated in the bill, we gather from the allegations that complainant was, before her marriage, and continued to be thereafter and up to the filing of the bill, an actual resident of this State; that while she was such actual resident, the defendant committed adultery in Washington D. C., in July and August, and continued to commit adulteries, till September 5th, at St. Louis, Missouri.

If the injured party is an actual resident of this State at the time the offense is committed, and the offense is committed without the State, and such actual residence continues till the bill is filed, the court will have jurisdiction though the residence has not been for one year. *Way v. Way*, 64 Ill. 406.

Counsel for appellant invites our attention to the evidence in this case which shows that appellant was at the time the bill was filed, and had been for more than twenty years, a resident of St. Louis, and he argues that such being the case, appellee took her husband's domicile immediately on her marriage. If we may look to the evidence at all on this question, we may

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regard the facts which are consistent with the allegations of the bill and sustain the jurisdiction as well as those which defeat it, and we find that while appellee was actually residing in this State, appellant, on September 23, 1886, married another woman in the State of New York, and that he lived with her in St. Louis, Missouri, until the date of filing the bill.

Now, granting that by a fiction of law the domicile of appellee, upon her marriage, became that of appellant in St. Louis, such fictitious domicile did not affect the fact of actual residence. It is said in *Way v. Way, supra*, that while a man may have several residences he can have but one domicile. There are authorities which seem to hold that residence and domicile are synonymous; that a wife, no matter where she in fact may abide, must in law be held to reside at the place of her husband's domicile. This theory is excluded by the terms of our statute. By force thereof a married woman may be an actual resident of this State though she has no domicile here; and if, while she is such actual resident, the offense which supplies the ground of divorce is committed, because of the "necessity of her separate and independent existence," thereafter her actual place of residence becomes her separate and legal domicile.

Of course such residence is meant as is not a mere visit or temporary sojourn, but is an abiding *animo menendi*. *Hopkins v. Hopkins*, 35 N. H. 474; *Dutcher v. Dutcher*, 39 Wis. 651; *Way v. Way, supra*; *Pate v. Pate*, 6 Mo. App. 49.

We are of opinion, therefore, that the facts of the case clothed the court with full jurisdiction; that there was no error in the decree, and that the same must be affirmed.

Decree affirmed.

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66 157

FRANK S. WEIGLEY

V.

CANUTE R. MATSON, SHERIFF, IMPL'D, ETC.

Bill to Set Aside Default Judgments—Record as Evidence—Fees of Creditor's Attorney—Issue of Executions.

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1. The record of a court showing a judgment by confession in open court, imports verity and can not be contradicted by parol evidence.

2. A stipulation by which a debtor agrees to pay the fees of his creditor's attorney, in case of legal proceedings to collect his debt, rests upon a good and valuable consideration, and will be sustained.

3. Upon a bill to have certain default judgments vacated and set aside, and to enforce an alleged prior lien, it is *held*: That the admission by the complainant that the judgments in question purport to have been entered in open court in term time, is an admission of the existence of conclusive evidence that such judgments were so entered; and that, as the judgments were part of the proceedings of the court in term time, it is immaterial whether the records were actually written up when the executions were issued.

[Opinion filed December 14, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

The bill in this case alleges that, on the 27th day of December, 1886, Frank S. Weigley, the complainant, recovered a judgment against Sidney Guy Sea, in the Superior Court of Cook County, for \$2,279.11 and costs, and on the same day caused an execution to be issued thereon to the Sheriff of Cook County, who thereupon levied the same upon a stock of merchandise belonging to said Sea; that at the time said execution was issued said Sheriff was in possession of said stock of merchandise under and by virtue of six certain pretended writs of execution issued upon six certain pretended judgments entered by confession in said Superior Court on the 27th day of December, 1886, in favor of various parties, amounting, in the aggregate, to \$16,670.80 besides costs; that said pretended judgments were entered and said executions issued without any authority of law; "that each and every of said pretended judgments so entered as aforesaid, purport to be rendered in open court, in the branch of the Superior Court presided over by the Honorable Elliott Anthony, one of the Judges of the Superior Court, on the 27th day of December, 1886, at the December term of said court."

The bill further alleges that the branch of said court presided over by said Judge was not opened by him on the first

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day of said term or at any time thereafter, and was not open and in session at the time said pretended judgments purport to have been entered, and had not been open for said December term; that the declarations and cognovits on which said judgments were respectively entered were presented to said Judge at the place other than the court house where said court is provided by law to be held, where no court was in session, and before either of said suits was docketed or commenced in said court, and that said Judge indorsed on said several declarations and cognovits the words, "Enter judgment, E. Anthony, Judge;" that afterward said declarations and cognovits were filed in the office of the clerk of said court, and that executions were immediately issued thereon by said clerk and placed in the hands of said Sheriff, who levied the same on said stock of merchandise; that at the time said executions were issued no entry of said judgments had been made upon the records of said court, and that said judgments were afterward entered without any authority other than as above stated; that said stock of merchandise has been advertised by the Sheriff for sale, and that the proceeds of the same will not be sufficient to satisfy said six judgments and the complainant's judgment; that said Sea is hopelessly insolvent, and has no other property subject to execution; that said pretended judgments and executions are absolutely void in law and create no lien on said property, and that the complainant's execution is the first lien thereon.

It is further alleged that each of said notes and warrants of attorney upon and by virtue of which said pretended judgments were entered, provides for the entry of judgment for the amount specified in the note, and five per cent. thereof in addition for attorneys' fees, such attorneys' fees amounting in all to over \$800; that said attorneys' fees operate as a fraud on the *bona fide* creditors of said Sea by diminishing his assets by that amount, and converting the same to the use of the attorneys of the plaintiffs in said judgments.

The bill prays that said six judgments may be declared null and void and be vacated and set aside, and that the executions thereon be declared to be void and of no effect, and that the

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complainant may be decreed to have a first and prior lien upon all the property levied upon, and that the Sheriff be directed first to pay the complainant the amount of his judgment before distributing any of the proceeds of said property to any other party.

A demurrer to said bill being sustained by the court, the complainant elected to abide by his bill, and thereupon the decree was entered dismissing said bill at the complainant's costs for want of equity. From this decree the complainant has appealed to this court.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellant.

A judgment by confession can be either entered in term time or vacation, and if in term time, it can only be in open court. *Conkling v. Ridgley*, 112 Ill. 36; *Anderson v. Field*, 6 Ill. App. 307, 314.

Judgments by confession can be entered before the clerk only in vacation, but during term time they must be entered in open court. The case must be brought before the Judge in person and passed upon by him. The clerk can not act for him. The entry of a judgment is a judicial act which the Judge of the court alone can perform. And he can only perform such act while sitting in open court and acting as a court. *Ling v. King*, 91 Ill. 571.

This is not a bill to set aside judgments on the ground of fraud or collusion, or irregularities, but it is a bill to remove an obstruction to the satisfaction of appellant's execution, and nothing more, based upon the fact that the said pretended judgments are absolutely void, because not entered by any court.

If the said pretended judgments were entered in vacation before the clerk, under the authority of the statute, then no execution would be valid, issued before the same were entered upon the records of said court, whatever may be the rule in term time. *Ling v. King*, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 15.

Messrs. FLOWER, REMY & HOLSTEIN, for appellee.

Where the court has jurisdiction of the parties and subject-

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matter of the action, and the journal of the court recites a trial and judgment in term time, the record imports absolute verity, and can not, in a collateral proceeding, be overthrown by parol testimony tending to show that the trial was had and the judgment rendered in vacation. *Mitchell v. Insley*, 7 Pacific R. (Kan.) 201; see, also, *Wiley v. Southerland*, 41 Ill. 25; *Hughes v. Cummings*, 2 Pacific R. 928.

A stipulation for the payment of attorneys' fees in a promissory note, in the event of an action to collect the same, is valid and enforceable. *Nickerson v. Sheldon*, 33 Ill. 372.

A judgment entered by confession, upon warrant of attorney, may properly include attorneys' fees, if authorized by the warrant of attorney. *Ball v. Miller*, 38 Ill. 110; *Clawson v. Munson*, 55 Ill. 394; *Smith v. Silvers*, 32 Ind. 321; *Imler v. Imler*, 94 Pa. St. 372; *Parham v. Pulliam*, 5 Cold. 487; *Huling v. Drexel*, 7 Watts, 126.

BAILEY, J. The complainant, having obtained a judgment against one Sea, and having levied his execution upon the property of his debtor, seeks by his bill to have certain prior judgments and executions against the same debtor and in favor of other creditors vacated and declared null and void, so as to give priority to the complainant's execution. The judgments thus attacked were entered by confession, and no claim is made that the indebtedness for which they were entered was not justly and in good faith due, nor are there any allegations of fraud or collusion. The claim to relief is based solely upon certain alleged irregularities in the entry of said judgments.

The bill admits that said judgments purport to have been entered in open court in term time, but it is alleged that, in fact, the branch of said court presided over by the Judge before whom said judgments purport to have been entered was not in session on that day and had not been opened for that term; that the declarations and cognovits were presented to the Judge out of court; that he there indorsed thereon directions to enter judgments, and that said papers, with such indorsements, being filed with the clerk, said judgments were entered by him.

It is the settled rule of law that the record of a court, show-

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ing a judgment by confession in open court, imports verity, and can not be contradicted by parol evidence. *Roche v. Beldam*, 119 Ill. 320. The record of such judgment is the only proper evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, both as against the parties to the judgment, and all others whose interests may be affected thereby. *Koren v. Roemheold*, 7 Ill. App. 646; *Richardson, v. Beldam*, 18 Ill. App. 527; *Jasper v. Schlesinger*, 22 Ill. App. 637.

The complainant, then, by admitting that the judgments which he is seeking to have set aside, purport to have been entered in open court in term time, admits the existence of judgment records which furnish conclusive evidence that said judgments were so entered, and he has therefore precluded himself by such admission from insisting that the contrary is the fact.

It is alleged that the executions are void because they were issued and delivered to the Sheriff before the judgments were actually entered upon the records of the court. As the judgments were a part of the proceedings of the court in term time, it is not material whether the records of the judgments were actually written up or not at the time the executions were issued. Such was the conclusion reached by us on full consideration of this question in *Jasper v. Schlesinger*, *supra*.

The point is made that the provisions of the warrants of attorney as to attorneys' fees was fraudulent as to other creditors, in that it appropriated the amount of such fees to the payment of the attorneys of the judgment creditors without consideration. It is claimed that to the extent of such fees at least the judgments should be vacated. A stipulation by which a debtor agrees to pay the fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings to collect his debt, is an agreement which is not only eminently just, but which rests upon a good and valuable consideration. It is not in the nature of a gratuity, but is a contract by which the debtor, in part consideration of the credit given him,

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agrees to indemnify his creditor against the consequence of his neglect or refusal to pay, whereby the creditor may be subjected to the necessity of employing and paying an attorney.

We are of the opinion that the bill presented no grounds for relief. The demurrer was therefore properly sustained.

Decree affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—FEBRUARY TERM, 1887.

MARTIN LYNCH, ADMINISTRATOR,
V.
EUGENE EIMER.

24	185
97	842

*Administration—Employment—Term of Service—Rate per Annum—
Contract—Instruction—Question for Jury.*

1. Where an employment is at a certain sum per annum, such sum may only be the rate of compensation agreed upon for the time served and not a specification of any particular term of service.

2. Upon appeal from a judgment allowing a claim against an estate, it is held: That an instruction in which it was assumed that an employment for \$900 per annum constituted a contract for an entire year, and that a continuance of the employment was governed by such contract, was calculated to mislead the jury; that said instruction also erroneously assumed a first contract for a year; that the jury might consider the original contract in ascertaining what the terms of the new agreement were under which the service was continued; that the claimant can not recover for a wrongful dismissal until he has proved a contract for a definite period; and that an objection based on a variance can not be first raised in this court.

[Opinion filed September 10, 1887.]

APPEAL from the Circuit Court of St. Clair County; the
Hon. AMOS WATTS, Judge, presiding.

The appellee filed his claim in the County Court against the
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estate of B. F. Switzer, deceased, in which he claimed to recover for one year's salary as book-keeper at \$900, less a credit of \$311.25 admitted to have been paid.

His claim being allowed, the administrator prayed and obtained an appeal to the Circuit Court, where, before the court and a jury, he was again defeated, and he brings the case to this court.

Messrs. TURNER & HOLDER, for appellant.

Mr. E. L. THOMAS, for appellee.

PILLSBURY, J. It appears from the evidence that the claim of the appellee is not for a year's salary earned in the employ of decedent, but arises from the fact claimed by him to exist, that he was employed for a year and was discharged without cause before the expiration of his term of service.

The appellee went to work for Switzer on April 2, 1882, and continued in his employ until August 8, 1885, when he was discharged.

The only evidence in the record bearing upon the question of an annual hiring for the entire ensuing year is the testimony of John Eimer, the father of the appellee, and certain entries in the books of Switzer claimed to have been made under his direction or approval.

The substance of Eimer's testimony is that Switzer saw him and asked him if he could get Eugene (the appellee) to keep his books; that if he was not mistaken Switzer said he was paying \$1,000 a year and would like to reduce expenses a little, but he was willing to pay Eugene \$900 per annum; was never present when they made a contract and don't know what their contract was.

The entries in the books relied upon show charges against Eugene for money received as salary.

These entries are alike except as to amounts and time of payment, one of which we give:

Expense Account:

Eugene Eimer, salary from June 1st to August 1, 1885, at the rate of \$900 per annum, \$150.

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In this condition of the evidence the court gave to the jury on behalf of the appellee, the following instruction:

“The court instructs the jury that if they believe from the evidence that Switzer in his lifetime employed Eimer for \$900 per annum, and that he began work on April 2, 1882, and continued to work under the same terms without any change, then the first contract governs, and if a new year was commenced the contract would be continued for that year under the same terms as the first year's employment, unless the jury believe from the evidence that a new contract was entered into.”

This instruction was calculated to mislead the jury and should not have been given. It assumes that an employment for \$900 per annum constitutes a contract for the entire year and if the employment was continued this first contract governs, etc. Again it assumes a *first* contract for a year, when the question should have been left to the jury to determine whether there was in fact a contract for a year.

Before the appellee can recover for a wrongful dismissal he must prove a contract for a definite period, as no presumption arises that a hiring for an indefinite time is a hiring for a year.

It does not necessarily follow that the amount of \$900 per annum as testified to by Eimer, or the entries upon the books, amount to conclusive proof that there was a hiring for an entire year in the first instance.

It may have been but a rate of compensation agreed upon for the time served and not a specification of any particular time agreed upon, as was said in *Pfund v. Zimmerman*, 29 Ill. 269, and also held in *Haney v. Calwell*, 35 Ark. 156. This evidence taken in connection with the other circumstances connected with the service may be proper for the consideration of the jury in determining what the real contract was between the parties, but do not of themselves make the contract for a definite time.

From all the evidence the jury are to ascertain what was the agreement between the parties, as it is evident that their relation existed by virtue of some kind of a contract.

The original contract did not, and could not, under the

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Statute of Frauds, extend into a second year, but it may be considered by the jury in ascertaining what the terms of the new agreement were under which the service was continued for the last year, or the part served before the dismissal. *Taterson v. Suffolk Man'f'g Co.*, 106 Mass. 56.

Regarding the point made that there is a variance between the claim filed and the proof, in this, that the claim is for a year's salary, and the proof shows that evidence of a wrongful dismissal is the basis of the action, it may be said no objection was interposed in the court below to the introduction of the evidence upon that ground, thus affording an opportunity to the claimant to amend his claim, and in such case the point now made for the first time must be treated as waived.

For the error of the court in giving the instruction for appellee, the judgment will be reversed and the cause remanded.

Judgment reversed.

THE MILWAUKEE MECHANICS' MUTUAL INSURANCE
COMPANY

V.

ALBERT KETTERLIN, FOR USE, ETC.

Fire Insurance—Change of Title to Avoid Policy—Conveyance of Homestead by Husband and Wife.

1. An estate of homestead under our statute may be legally conveyed from the husband to the wife.

2. Such a conveyance is such a change in the title as will avoid a policy of fire insurance containing a stipulation that any change in the title without the consent of the company shall have that effect.

[Opinion filed September 10, 1887.]

IN ERROR to the Circuit Court of Effingham County; the
Hon. WILLIAM C. JONES, Judge, presiding.

Mr. S. F. GILMORE, for plaintiff in error.

Messrs. WOOD BROTHERS, for defendant in error.

The conveyance of a homestead by a husband to his wife, she not subscribing or acknowledging the same, and the husband continuing in occupancy, is insufficient to pass the legal title. The forfeiture provided in clause ten of the policy is not one favored by the law, and the party claiming it must bring himself strictly within its provisions. Hence our Supreme Court has held that either the passing of an equitable interest, or the parting of the legal title, by way of mortgage, is not such change of title as to avoid a policy, under a similar clause. *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53.

Notwithstanding the deed Ketterlin still had his homestead in the insured property.

To avoid the policy, there must have been an alienation or change of title in fact; not a nominal one. *Flanders on Fire Ins.*, 417. There must be nothing short of a conveyance of the title, a parting of all the interest of the owner and passing it to the grantee. *May on Insurance*, 291, Sec. 267. Hence it is well settled that the policy is not avoided by a conveyance that is, for any cause, void. *Wood on Fire Ins.*, Vol. 1, 703; *School District v. Ætna Ins. Co.*, 62 Me. 330; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53.

WILKIN, P. J. The facts necessary to be considered in giving our reasons for reversing this case may be briefly stated as follows: On November 12, 1883, plaintiff in error issued its policy of insurance to defendant in error Ketterlin for \$1,200 on a two-story frame store-house on lots 1 and 2 in block 9 in the Town of Dieterich, for one year.

On the 27th of December, 1883, the other defendant in error, Swan Swanson, took a mortgage on the insured premises from Ketterlin and wife to secure the sum of \$950 and thereupon plaintiff in error stipulated that the loss, if any, should be payable to said Swanson as his interest might appear. This policy was renewed by Ketterlin November 11, 1884, for another year, and on the 9th day of January following, he conveyed the property by deed of general warranty to his wife, Amelia, without obtaining the consent of plaintiff in error. By the terms of the policy it is agreed that the policy shall

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be wholly void if the property be sold, transferred, or if any change takes place in the title, use or occupation by act of the assured without the consent of the company indorsed on said policy. While there was a room in the building used and occupied in carrying on a small mercantile business, it was also occupied by Ketterlin as a family residence, and with the lots on which it was built, was his homestead. There were some transfers of the stock of merchandise during the years 1884 and 1885, prior to the loss. Ketterlin, however, continued to occupy the building with his family as his homestead and worked in the store as a clerk, and we hold that there was not such a change of the use and occupation of the premises as would work a forfeiture of the policy.

There is a conflict in the evidence as to whether the premises were worth more than \$1,000, but the jury no doubt found that fact in favor of the theory of defendants in error and we have no disposition to disturb that finding. The legal question, therefore, as to whether the conveyance by Ketterlin to his wife produced such a change in the title to the insured premises as by the stipulation in the policy renders it void, may be considered in the light most favorable to defendants in error. It is earnestly insisted and ably argued by counsel in their behalf that the deed being from husband to wife and purporting to convey a homestead not exceeding in value \$1,000; is absolutely void for the reason that by the express provisions of our statute no release, waiver or conveyance of the estate of homestead shall be valid, unless the same is in writing, subscribed by the householder, and his or her wife or husband if he or she have one. The question here involved may be further simplified by stating it thus: can the estate of homestead under our statute be legally conveyed from husband to wife?

Although it has not been decided by our Supreme Court, on the authority of *Thompson on Homesteads*, 473; *Ruhl v. Bingenheimer*, 28 Wis. 84; *Iron v. Mills et al.*, 41 Tex. 310, and *Stevens v. Castal* (Sup. Ct. Michigan), 5 Western Rep. 724, the question must be answered in the affirmative. These authorities, in upholding such conveyance, proceed upon the

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reasoning that the statutory requirement that husband and wife shall join in a conveyance of the homestead is for the protection and benefit of the wife, and hence, when the conveyance is to her, its sole object is accomplished without her joining.

It is true that under our statute, children have an interest in the homestead, but it is an interest absolutely under the control of the parents, and in no sense a vested interest. The parents may defeat it at pleasure by conveyance or abandonment. *Clubb v. Wise*, 64 Ill. 157; *Shepard v. Brewer et al.*, 65 Ill. 383. The validity of the conveyance by Ketterlin to his wife being questioned upon no other ground, we hold that the title was changed thereby, and being without the consent of plaintiff in error, rendered the policy void and for that reason the judgment of the Circuit Court must be reversed.

Reversed.

C. C. CROSS
v.
SCHOOL DIRECTORS.

School Contract with Teacher for Term Extending into New School Year—Discharge—Action for Salary.

1. School Directors have no power to employ a teacher just before the expiration of the school year for a term extending three months into the ensuing year.

2. In the case presented, it is *held*: That the plaintiff can not recover under his first contract, which was abandoned by mutual consent; that his discharge was not wrongful; and that he can not recover for the time taught, the cause of action set out being the wrongful discharge.

[Opinion filed September 10, 1887.]

IN ERROR to the County Court of Saline County; the Hon. BOEN PHILLIPS, Judge, presiding.

CROSS v. School Directors.

Declaration in assumpsit by plaintiff in error, containing two counts: The first alleges that on the 6th of March, 1886, a written contract was entered into by the plaintiff, a legally qualified school teacher, and the defendants, at a special meeting of said defendants as the Board of Directors of said district, employing the plaintiff to teach the public school in said district for a term of three months, commencing April 1, 1886, at \$40 per month. That the plaintiff began his school under said contract April 1st, and continued it until April 12, 1886, when, by mutual consent of the plaintiff and the defendants, at a special meeting, said contract was discontinued as to the unexpired part of said term. The second alleges that on the 12th of April, 1886, a second written contract was entered into by the plaintiff and defendants at a special meeting, employing him to teach the public school in said district, for a term of three months, commencing on said date, at \$2 per day. That the plaintiff began his school under said contract April 12th, and continued it until April 19, 1886, when the defendants discharged him from said school; that he was wholly unemployed during the remainder of the said three months, and has sustained \$140 damages.

The above statement of the claims made by the plaintiff is sufficient to a proper understanding of the opinion of the court. The court below held the contract not binding upon the district and a verdict for defendants followed, upon which judgment was entered by the court and plaintiff sued out this writ of error to reverse such judgment.

Messrs. MARSH & SCOTT, for plaintiff in error.

Messrs. BOYER & CHOISSER, for defendants in error.

PILLSBURY, J. The first contract being abandoned by mutual consent, the plaintiff can not recover because he did not teach the full term of three months thereunder. The second contract, entered into on the 12th day of April, engaging the plaintiff to teach for a term of three months thereafter, when the election for directors of the district would occur, under

the statute, on the 17th of the same month, and a new organization of the Board of Directors then take place, was such an evident attempt upon the part of the out-going board to control the school for three months of the ensuing school year, irrespective of the wishes of the people that might be expressed at the election, or the desires of the new Board of Directors, then to be provided for, as to render it voidable by the incoming board, under the authority of the cases of *Stevenson v. School Directors*, 87 Ill. 255, and *Davis v. School Directors*, 92 Ill. 293. It would be a work of supererogation for us to attempt to add to, or enlarge upon, the reasons so clearly stated in those opinions why such contracts can not be upheld, and we have no desire so to do.

Directors can not be permitted, five days before the current school year expires, to hire a teacher, perhaps obnoxious to the people of the district, to teach a term of school extending three months or nearly so into the ensuing school year. The only doubt we have had about the correctness of the judgment of the court below, in favor of the defendants, arises from the fact shown that the plaintiff taught for the space of about three school weeks, under contracts, which, although voidable by the successors of those making them, would furnish the measure of the recovery so far as fulfilled, during the continuance in office of the directors making them.

A careful examination, however, of the declaration in the case, shows that the plaintiff below does not claim for the services actually performed, but makes the gravamen of his action the wrongful discharge by which he lost prospective gains and profits that otherwise he would have made. No common counts appear in the declaration, and no such breach of the special contracts is alleged as would authorize a recovery for the money due him for the time actually engaged in teaching.

Minor alleged errors of the court are not further noticed, as the plaintiff could have not recovered even if such errors had not been committed. *Davis v. School Directors, supra.*

Perceiving no error for which the judgment below should be reversed, it will be affirmed.

Judgment affirmed.

City of East St. Louis v. Trustees of Schools.

THE CITY OF EAST ST. LOUIS
V.
TRUSTEES OF SCHOOLS.

Municipal Corporations—Proceeds of Dram Shop Licenses—Action by School Trustees—Consent Judgment—Agent—Authority—Mandamus—Motion to Vacate Judgment and Order.

In an action by school trustees against a municipal corporation to recover "one-half of all money received into the city treasury from dram shop licenses," as provided by the charter of the defendant, it is *held*: That the representative of the defendant was duly authorized to enter its appearance and consent to the rendition of the judgment in question and consent to the order for the writ of mandamus; that the court below properly overruled the motion to vacate said judgment and order; and that if, on the return of the writ, it appears that the City Council was ordered to do an impossible and illegal act, the court below will doubtless so modify its order as to protect the interests of both parties.

[Opinion filed September 10, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. F. G. COCKRELL and E. R. DAVIS, for appellant.

A suit was pending against the city on the part of the trustees, and a suit involving the same subject-matter was pending against the City Treasurer; the City Attorney had filed pleas in the case against the city which raised the question of the liability of the city; it was well known that it was a matter of doubt whether, under the Harper Law, the trustees were entitled to the money arising from dramshop licenses; but, without consulting the City Attorney or either of the special counsel, without giving any reason, and without any reason in fact, Mr. Flannigen withdrew the pleas filed by the City Attorney, and allowed a judgment to be entered against the city, and thereafter permitted an order for a peremptory mandamus to be awarded for the payment of the entire judgment, interest

and costs, and this without regard to the necessary current expenses of the city, and without regard to other prior mandamus orders. It is claimed that Mr. Flannigen had authority from the City Council to appear and consent to the judgment and the order for peremptory mandamus. In reply to this, we wish to say that there is no record of any such authority; and while counsel for the trustees and Mr. Flannigen did produce what purported to be a certified copy of a motion passed by the Council, it is difficult to see how the City Clerk could certify to a motion without any record to support it. See *Logansport v. Crockett*, 64 Ind. 319; *People v. Lee*, 112 Ill. 113.

But if the action of a City Council can be proved in this way or by parol testimony, or if in fact the City Council did authorize Mr. Flannigen to consent to the entry of the judgment and the order for mandamus, it only shows that the Council was actuated by corrupt motives, for the reason that the transaction was so high-handed and outrageous, going to the extent of pledging the entire revenue of the city a year in advance, without regard to the necessary current expenses of the city, that such an act would bear no other construction. The city, as appears from the record, is and was indebted beyond its constitutional limit, and is and was hampered with numerous judgments and mandamus orders. It was well known the city could not in any one year raise over \$70,000 net revenue, and out of this amount the necessary current expenses had to be paid. No power can rightfully take away from a city the means necessary for current expenses. *City of East St. Louis v. People*, 6 Ill. App. 76.

Mr. L. H. HIRE, for appellees.

The issue at bar arises upon a motion filed at the close of the May term, 1887, of the St. Clair Circuit Court, to set aside and vacate a mandamus order entered at the September term, 1886, of said court, and to vacate a judgment in another case rendered at said September term. The grounds for the motion are that the judgment was unauthorized, illegal and void. That it was fraudulently obtained. That the order for mandamus requires the performance of an impossible thing.

City of East St. Louis v. Trustees of Schools.

The original judgment was the result of a suit commenced in the Circuit Court. An amended declaration sets out that on the 30th of November, 1886, the defendant, City of East St. Louis, had collected and received into its city treasury from dram shop licenses, between the date mentioned and the 1st day of January, 1881, the sum of \$200,000, and that one-half thereof belonged to the Trustees of Schools. There were several suits pending between the Trustees and the city and its ex-Treasurer, Launtz, and its present Treasurer, Flannigen, to enforce the payment of that money to the schools. On the 30th of November, 1886, the attorney of the Trustees went before the City Council of said city and proposed to end all existing litigation by taking a judgment for all moneys which could be proved to be due, provided the city would consent to the granting of a mandamus to compel the payment of said judgment. A motion was made and adopted, unanimously authorizing Alexander Flannigen, as attorney for the city, to appear for it in the case and take the action he did. In the suit at law the court heard the evidence and rendered judgment accordingly. In the mandamus proceeding the order says, "it appearing to the court that the said defendant by its City Council had duly authorized said attorney to act for it and to consent to the entering of a judgment according to the prayer of the petition of relators, and a jury being waived by the parties, the court hears the evidence," etc.

It is claimed that there is no evidence that Flannigen was authorized to appear. The courts have decided that the authority of an attorney who appears in a case is presumed until the contrary is shown. But further, he produced to the court a certified copy of the action of the City Council, and the court found "that said attorney was duly authorized to appear for and on behalf of the defendant." The court found that fact; and again, when the matter was brought before the same Judge upon this motion he again found the facts.

The Supreme Court has had the question before it as to whether the city owes the Trustees the one-half of the dram shop fund by it received into its treasury, and has decided that the city must pay it over to the Township Treasurer. *City of East St. Louis v. Trustees of Schools*, 102 Ill. 489.

After a final judgment has been entered, and the term of court at which the judgment was rendered has closed, no steps having been taken to vacate the same, the court, at a subsequent term, has no power to alter or amend its final judgment so rendered, except, perhaps, in matters of mere form. *Messervey v. Beckwith*, 41 Ill. 452; *McKindley v. Buck*, 43 Ill. 488; *Fix v. Quinn*, 75 Ill. 232; *Hibbard v. Mueller*, 86 Ill. 256; *Hearson v. Graudine*, 87 Ill. 115; *Becker v. Sauter*, 89 Ill. 596.

After the close of a term at which a judgment is rendered, its absolute verity can not be attacked even by affidavit. *Goucher v. Patterson*, 94 Ill. 525.

Per Curiam. We have examined the record in this case, the printed briefs, and arguments of counsel, and have had the benefit of oral arguments on behalf of the respective parties, and believing the best interests of all concerned requires that our decision should be announced at once, we have concluded to file this *per curiam* opinion, rather than delay the matter to prepare and file one more elaborate. It sufficiently appears, from the affidavits and evidence in the record, that Alexander Flannigen was duly authorized by the City Council of East St. Louis to enter the appearance of said city and consent on its behalf to the rendition of the judgment against it. And as there is no evidence of fraud or collusion rendering his action in the premises void, and no valid defense to said claim of the School Trustees, for which said judgment was entered, was shown, we find no reason why it ought to have been vacated, and mandamus being the only remedy to collect the judgment, the order for such a writ was properly made by the court with the consent of the city through its authorized attorney. The motion in this case made in the court below being to set aside and absolutely vacate such order and vacate said judgment, we think was properly overruled. If it should appear by the return to the writ, the City Council was ordered by it to do an impossible and illegal act, the Circuit Court on such return being made will doubtless refrain from punishing the failure to obey its mandate as a contempt, and modify its order, so that the judgment can be collected,

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and yet the interests of the city be protected by leaving sufficient funds at its disposal for the necessary current expenses of the city government. The judgment is affirmed.

Affirmed.

MICHAEL SMITH

v.

JOSIAH FORTH.

Practice—Evidence.

An objection to the admission of an account book in evidence can not be first raised in this court.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of White County; the Hon. C. C. BOGGS, Judge, presiding.

Mr. ROSS GRAHAM, for appellant.

No briefs were filed for appellee.

Reasons for affirming by WILKIN, J. This is a very small case growing out of a controversy over a saloon bill. Appellee sued appellant before a Justice of the Peace, and on appeal to the Circuit Court (by which party does not appear), he recovered judgment for the amount of his claim, \$16.85, and the case is again appealed to this court.

On looking into the record we find that the principal ground relied on for a reversal is the admission of objectionable evidence on behalf of appellee. Appellee's bartender testified that he kept a book of the items sold by himself and other employes of appellee to appellant, which he produced, and the items were without objection read to the jury. On cross-examination he stated that some of the items were rendered to him by other bartenders, and that he knew nothing personally

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as to their correctness. The twenty items read to the jury aggregate the amount of the judgment below. Appellant admitted that he got drinks at the bar of appellee for which he paid nothing, but claims that, by an arrangement previously made with appellee, he was to have them without charge. This appellee denies. Appellant also swore that in no event could his bill exceed the sum of \$3.00. In rebuttal the account book kept by appellee's bartender was again offered in evidence and admitted without objection. It is now urged that there was error in admitting the book, no sufficient foundation having been laid for its introduction. It is a sufficient answer to this position to say that it can not be urged for the first time in this court. No objection or exception appears to have been taken on the trial. The book account, together with the testimony of the barkeeper, made a *prima facie* case for appellee, and it was for the jury to say whether it was overcome by the evidence of appellant. We think the jury was fairly instructed as to the law of the case, and find no substantial cause for a reversal and further prolongation of this unprofitable litigation.

Affirmed.

DAVID BOYD
V.
CORYDON BARNETT ET AL.

Homestead—Conveyance to Wife—Bill and Aid of Execution against Grantor—Fraud.

The statute takes the homestead out of the available assets of the debtor for the payment of his debts. The creditor can not, therefore, complain of its conveyance by the debtor to his wife or another. Under the statute the grantee holds, free from all claims of the grantor's creditors.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of Randolph County; the
HON. GEORGE W. WALL, Judge, presiding.

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Bill in equity by plaintiff in error against the defendants in error in aid of execution in his favor, issued out of the Circuit Court of Randolph County, October 2, 1884, upon transcript of Justice's judgment recovered September 13th of the same year.

Avers its return *nulla bona* and issue of *alias* execution which was still in the hands of the Sheriff at time of filing bill.

Avers that on April 19, 1884, the said Corydon was owner of the property sought to be made subject to the execution, and on that day conveyed it to one Despain, and that Despain, on the 21st day of the same month, conveyed the same to Mary J., the wife of Corydon; that said conveyances, while purporting to be supported by a valuable consideration, were in fact mere shams, and intended to defraud complainant; alleges insolvency of said Corydon and that he and his said wife absconded and went to the State of Kansas.

Asks to have the said deeds set aside and the lands declared subject to sale on said execution. The answers of the principal defendants, Corydon and his wife, after denying the principal allegations of the bill, set up that the real estate in controversy constituted the homestead of the said Corydon and family, and that it was of less value than \$1,000 at the time of the conveyances, and claiming that in such case the said Corydon had the right to convey it to whom he pleased, if done in good faith which they averred, regardless of the fact that he was in debt, and upon this point arises the only controversy in this court or the courts below.

Upon hearing, the court below dismissed the bill and Boyd sued out this writ of error.

Mr. R. J. GODDARD, for plaintiffs in error.

Mr. A. G. GORDON, for defendants in error.

No conveyance of property exempt from execution can be considered fraudulent as against a creditor. Injury is an essential element of fraud, and where injury is wanting there can be no fraud. *Leupold v. Krause*, 95 Ill. 440. This was a case involving a homestead. A similar rule prevails in

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reference to personal property. *Vaughan v. Thompson*, 17 Ill. 73; *Cole v. Green*, 21 Ill. 104; *Washburn v. Goodheart*, 88 Ill. 229. See, also, *Dreutzell v. Bell*, 11 Wis. 114; *Pike v. Miles*, 25 Wis. 164.

Neither fraud, nor even the commission of a criminal offense, can work a release or forfeiture of the homestead right. *People v. Stitt*, 7 Ill. App. 294.

A judgment is not a lien on homestead. *Hartwell v. McDonald*, 69 Ill. 293; *Bliss v. Clark*, 39 Ill. 590.

A judgment debtor may sell his homestead and give title to grantee, free of judgment lien. *Green v. Marks*, 25 Ill. 221; *McDonald v. Orandall*, 43 Ill. 231; *Lytle v. Scott*, 2 Ill. App. 646.

PILLSBURY, J. It is contended by plaintiff in error that the evidence shows that the conveyances by which this property in question became transferred to the wife were not made in good faith, but the understanding of the parties was that she should hold the title in trust for him, and, being purely voluntary, he has still such an interest in it that equity will take and apply it to the payment of his debt, as it appears that the parties abandoned it as a homestead by taking up their residence in Kansas, and leaving this land to a tenant now occupying it.

Without going into the testimony in detail, as it would serve no useful purpose, we will content ourselves with saying that we have carefully read it as contained in the record, and given to the statements of each and every witness sworn the best consideration of which we are capable; and while we do not think the defendants established their claim of the payment by the conveyances of such antecedent debts owing from the husband to the wife, as a court of equity would support as against existing creditors, we fail to find any evidence that they were made upon any secret trust that the land should be held, treated or considered as still belonging to said Corydon, the defendant in execution, or that he should thereafter have any interest therein or control over it.

It appears to us to be a case where the husband being in

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debt conveys the homestead through an intermediary to his wife to the end that whatever may befall him she and his children shall have and possess a home free from the interference of his creditors.

The question then arises, whether the law prohibits this action and will stamp it as fraudulent as to such existing creditors.

Section 1 of the Homestead Act of 1874, after defining the right, provides that "such homesteads, and all rights and title therein, shall be exempt from attachment, judgment, levy or execution sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." And section six, "When a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not have been subject in the hands of such owner."

This statute is so plain that it hardly seems capable of being made clearer by judicial exposition.

No creditor can claim that he gave credit upon the faith of the homestead of his debtor, for he well knows he can never look to it for payment so long as it continues such. No judgment that he may recover can in any manner affect it. It is taken by the statute out of the available assets of the debtor for the payment of his debts, as effectually as if he had never owned or possessed it.

No creditor, therefore, can be said to be injured because the debtor retains it in defiance of him.

The creditor can not legally be said to be injured because the homestead is placed beyond his reach, for he has no right to look to it at all for the satisfaction of his claims against the debtor whatever form they may assume.

In fact, it is placed beyond their reach to all intents and purposes, except by the voluntary action of the husband and his wife, if he have one, in the manner provided by the same act that creates it. The clause of the sixth section, quoted above, invests the grantee of the homestead with all the rights, exemptions and immunities attaching to it in the hands

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of the grantor. The grantee holds it as free from all claims of the creditors of the debtor grantor, under this statute, as he himself could have held it if not conveyed.

From these provisions, then, the creditor can not claim to be injured if the homestead be sold and possession be surrendered under the deed. He is placed in no worse position because of this action of the debtor. He had no right to subject the homestead to the payment of his debt in the hands of his debtor, and his inability to follow it is continued after the sale.

His rights are, therefore, not in the least affected, impaired nor denied. Even if we had found that the sale to Despain and from him to the wife of said Corydon, were made with intent to defraud the complainant as alleged in the bill, still the conveyance would be good, as the property did not exceed \$1,000 in value, under the case of *Leupold v. Krause*, 95 Ill. 440, and if this be so, then a mere gift of the property made in good faith ought to be held valid for much weightier reasons. Finding, as we do, that this conveyance was made for a provision to the wife and family, and of property upon which the complainant below did not have and could have no *lien* or right, he is in no position to question it.

No error was committed by the court below in dismissing the bill and its decree will be affirmed.

Decree affirmed.

CHICAGO & ALTON RAILROAD COMPANY

V.

JOHN M. DILLON.

Railroads—Collision at Highway Crossing—Practice—Evidence—Comment by Counsel on Former Verdicts—Instructions—Comparative Negligence—Signals—Sec. 68, Chap. 114, and Sec. 1, Chap. 121, R. S.

1. In an action against a railroad company to recover damages caused by a collision at a highway crossing, it is *held*: That witnesses for the

24	203
70	466

24	203
106	509

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plaintiff were properly permitted to testify that they could have heard the bell or whistle if rung or sounded; that it does not appear from the record that the action of counsel for plaintiff in commenting on former verdicts was improper; that there was no error in giving and refusing instructions; that the jury were justified in finding that the place of the injury was on a public highway, and that a failure to give the required signal was statutory negligence; that the questions of fact as to the negligence or comparative negligence of the parties were properly submitted to the jury; and that the finding on said questions is supported by the evidence.

2. It is not error to refuse instructions which correctly state rules of law applicable to the case, when said rules are fully stated in other instructions given at the instance of the same party.

3. The application of Sec. 68, Chap. 114, R. S., requiring signals at public highways, is not limited to the roads defined to be public highways in Sec. 1, Chap. 121, R. S.

[Opinion filed September 10, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. AMOS WATTS, Judge, presiding.

Messrs. LUKE H. HITE and BROWN & KIRBY, for appellant.

Whether the bell or whistle was in fact sounded was a question of fact to be found by the jury and it was not for the witnesses to give opinions or conclusions. *Hopkins v. I. & St. L. R. R. Co.*, 78 Ill. 32; *C. & N. W. R. R. Co. v. Moranda*, 108 Ill. 576; *Pennsylvania Co. v. Conlan*, 101 Ill. 93.

It was improper to submit to the jury the question whether Avenue F was or was not a public highway, which is a question of law, without defining to the jury what constitutes a public highway. *Forbes v. Ballenseifer*, 74 Ill. 183, 187.

There was no evidence legally competent to show Avenue F to be a public highway. *McIntyre v. Storey*, 80 Ill. 127.

The instruction on comparative negligence is inaccurate in stating that though the plaintiff may have been guilty of "some" negligence, which is comprehensive enough to embrace gross, ordinary and slight negligence, yet he might recover if defendant's negligence was gross and his slight. If that "some" negligence of plaintiff was "gross" or "ordinary," it was error to submit the proposition in that form to the jury.

C., B. & Q. R. R. Co. v. Johnson, 103 Ill. 512; C., B. & Q. R. R. Co. v. Dougherty, 12 Ill. App. 181; U. R. & T. Co. v. Kallaher, 12 Ill. App. 400.

“When danger is actually known or apparent to ordinary observation, or reasonably to be apprehended, proof of positive or special care must be made to warrant a recovery.” C., B. & Q. R. R. Co. v. Olson, 12 Ill. App. 255; N. P. R. R. Co. v. Heileman, 49 Pa. St. 60; P. R. Co. v. Beale, 73 Pa. St. 504.

“On approaching a railroad a traveler must use his eyes and ears, and must avoid danger, if he can, notwithstanding the negligence of the company.” Henze v. St. L., K. C. & N. R. R. Co., 71 Mo. 636; Purl v. St. L., K. C. & N. R. R. Co., 72 Mo. 168; Pa. Co. v. Rudel, 100 Ill. 603; C. & N. W. R. R. Co. v. Hatch, 79 Ill. 137.

Neglect to sound a whistle or ring a bell is not such neglect as will authorize a recovery of itself; but it must be shown by the evidence that the injury was the result of such negligence. I. & St. L. R. R. Co. v. Blackman, 63 Ill. 117; C., B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; I. C. R. R. Co. v. Benton, 69 Ill. 74; C., B. & Q. R. R. Co. v. Notzki, 66 Ill. 455; C., B. & Q. R. R. Co. v. Damerell, 81 Ill. 450.

The conclusion from all the cases is, that if one goes upon a track without taking the necessary precautions to ascertain whether there is an approaching train or not, he is guilty of gross negligence, and he can not recover. N. P. R. R. Co. v. Heileman, 49 Pa. St. 60–64; P. R. Co. v. Beale, 73 Pa. St. 504. See, also, C., B. & Q. R. R. Co. v. Olson, 12 Ill. App. 255; C., B. & Q. R. R. Co. v. Dougherty, 12 Ill. App. 181; U. R. & T. Co. v. Kallaher, 12 Ill. App. 400.

Messrs. W. H. BENNETT and DILL & SCHAEFER, for appellee.

The witnesses were properly permitted to testify that if a bell had been rung they would have heard it. P., P. & J. R. R. Co. v. Stiltman, 88 Ill. 529.

In addition to this, there were seven witnesses who were present and saw the collision, and swear positively that no bell was rung nor whistle blown.

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The instruction on comparative negligence is an exact and literal copy of the instruction in the case of *City of Chicago v. Stearns*, 105 Ill. 554, which is expressly approved by the court. See, also, *C. & A. R. R. Co. v. Johnson*, 116 Ill. 206.

The refused instructions contain no principle of law applicable to the case that had not already been given over and over again.

It is not error to refuse instructions which in substance have already been given. *Hessing v. McCloskey*, 37 Ill. 341; *Wood v. Clark*, 21 Ill. App. 464; *Smith v. Taggart*, 21 Ill. App. 538; *Stephenson v. Morrissey*, 22 Ill. App. 258.

The question of negligence and comparative negligence is one of fact for the jury, and the finding will not be disturbed except in a clear case. *Haworth v. G. W. R. R. Co.*, 39 Ill. 346; *Hillmer v. R., R. I. & St. L. R. R. Co.*, 72 Ill. 235; *Gillis v. I. C. R. R. Co.*, 68 Ill. 317; *Schmidt v. C. & N. W. R. R. Co.*, 83 Ill. 405; *Hetherington v. I. C. R. R. Co.*, 83 Ill. 510; *O'Connor v. T., W. & W. Ry. Co.*, 77 Ill. 391; *Lee v. C., B. & Q. R. R. Co.*, 87 Ill. 454.

The place where appellee was hurt was a highway crossing. It was not only dedicated as a highway, but it had been used and treated as such for more than ten years at the time of this injury. *McIntyre v. Storey*, 80 Ill. 127. It was a numerously traveled crossing, the most numerous (except one) in the county. It was known to the public as a highway, and treated by the railroads as such. They rang the bells and whistled when approaching it.

WILKIN, J. This was an action on the case brought by plaintiff below to recover for a personal injury, and damages sustained by injury done to his horse and wagon through the alleged negligence of appellant's engineer and fireman in failing to ring a bell or sound a whistle at a public road crossing as required by statute.

The injury occurred at the national stock yards at East St. Louis on a road called "Avenue F." Appellee was driving north and about to cross the railroad track when a locomotive of appellant struck his horse and wagon, killing the horse and

destroying the wagon, and also severely injuring him. On the west side of the avenue, south of the railroad track and in the angle formed by the two, was a building near to both the avenue and the track, and so obstructing the view, that neither appellee nor the engineer on the locomotive could see the other, nor could appellee see the locomotive until very near the crossing, and it is clear from all the proof that neither did see the other until about the moment of the collision. Three trials have been had in the Circuit Court, each resulting in a verdict for appellee, and the case is before us on a second appeal by defendant below. At our August term, 1885, we reversed a judgment of the Circuit Court for errors in instructions. The evidence then before us and that in the present bill of exceptions is substantially the same, and the error now urged as ground for reversal, going to the substantial merits of the case, were also urged and considered on the former hearing. Our opinion then filed is reported in 17 Ill. App. 355. Having now decided to affirm the judgment, it would be unprofitable to do more than briefly state our reasons for so doing.

Witnesses having testified that they were near the crossing at the time of the accident, stated that they heard no bell or whistle. They were then allowed to answer, over objections by appellant, the question, "state if you could have heard one if it had sounded?"

Whether the ruling of the learned Judge presiding at the trial, as to the competency of the question, conformed to the better rule or not, we think it is sustained by the decision of our Supreme Court in *Pennsylvania Co. v. Boylan*, 104 Ill. 595, and there was no error in overruling the objection.

In the bill of exceptions this statement appears: "James M. Dill, attorney for the plaintiff, in the closing argument to the jury, referred to the former verdicts of \$875 and \$4,000, to which counsel for the defendant objected." What ruling, if any, the court made upon the objection does not appear. Appellant asked the court to instruct the jury that the comments of counsel in the closing argument, wherein he referred to former verdicts, were improper and should not be considered by the

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jury, and that the jury should not, in any respect, be influenced by what former verdicts may have been, which was refused. It is now earnestly insisted that there was such misconduct on the part of counsel in commenting on former verdicts rendered in the case as to greatly prejudice its rights, and that such conduct taken in connection with the refusal of the court to instruct the jury as asked with reference thereto, should be held such error as to reverse the judgment. There is nothing whatever in the bill of exceptions to indicate the connection in which the former verdicts were mentioned, nor from which we can determine the object or motive with which the reference was made. All that counsel is shown to have said may have been perfectly proper and said in such connection as to render it harmless to appellant; it might, on the contrary, have been highly improper, and if said in such connection and with the purpose of influencing the jury to render a similar verdict to those referred to, it was improper, and the instruction asked should have been given. With the information furnished us by the record, we can not say that the Judge, who heard all that was said in the argument on both sides, knew what elicited the comments, etc., erred in holding the reference not improper as we must presume he did in refusing to give the instruction.

But three instructions were given on behalf of plaintiff below, and they are each criticised by counsel for appellant as tending to mislead the jury. We find no substantial error in either of them, and while, perhaps, more apt language might have been used to express the legal propositions announced by them, we can not believe that, taken in connection with the voluminous and liberal instructions given on behalf of appellant, the jury could have been misled as to the law of the case.

It is also urged that certain refused instructions, other than the one previously referred to, should have been given, as asked by appellant. As already stated, the court did fully instruct the jury on every theory of appellant's defense, and, as we think, construed the law most liberally in its favor.

The rules of law applicable to the case, correctly stated in the refused instructions, were announced to the jury in those

given, and we think the refusal of those so marked was proper.

The position that "Avenue F" is not a public highway within the meaning of the statute requiring signals, is not tenable under the evidence of the case. It is shown to have been open to and used by the public as a road for more than ten years. It was one of the most public roads in the County of St. Clair, so far as it could become so by general use and recognition.

Appellant's employes, as well as those of all other railroad corporations using the various tracks in the stock yards, treated it as a public highway, and, as they swear, habitually gave the signals. It could not have been the intention of the Legislature that Sec. 68, Chap. 114, R. S., requiring signals at public highways should only apply to roads defined to be public highways in the first section of the chapter on roads and bridges. We think the jury was fully justified by the proofs, under the instructions of the court, in finding that the place of the injury was on a public highway, as alleged in the declaration, and a failure to give the required signal, statutory negligence.

The questions of fact, as to whether or not appellant was guilty of negligence, and appellee in the exercise of due care at the time of the injury, or on the doctrine of comparative negligence, whether or not appellant was guilty of gross and appellee only of slight negligence, seem to have been fairly submitted to the jury.

We can not say that the finding on those questions in favor of appellee is so far unsupported by the evidence as to make it our duty to set it aside by a reversal of the judgment. The fact that repeated trials of the case have already been had with like results can not be ignored in this decision, and on the whole record, as it now appears, we are of the opinion that the judgment should be affirmed.

Judgment affirmed.

C. & A. R. R. Co. v. Fietsam.

CHICAGO & ALTON RAILROAD COMPANY
v.
SEBASTIAN FIETSAM, ADMINISTRATOR.

Railroads—Action for Damages for Causing a Death—Incompetent Testimony—Ruling Out—Time of—Offer of Evidence after it has been held Incompetent by this Court—Instructions—Comparative Negligence—Fellow-Servants—Practice.

In an action against a railroad company to recover damages for causing the death of the plaintiff's intestate, it is *held*: That the defendant can not object to the admission of incompetent testimony called out by its own cross-examination of a witness for the plaintiff; that an objectionable answer could not have any greater weight with the jury because not ruled out until a later stage of the trial; that plaintiff's counsel did not exceed the limits of strict professional conduct in again offering evidence deemed competent by him, although declared incompetent by this court on a former appeal; that it is not indispensable to a right of recovery that the question of comparative negligence be submitted to the jury by the plaintiff; that in a proper case either party may ask the court to submit said question; that there was no error in giving and modifying instructions; that, if the defendant desired to raise the questions whether the plaintiff's intestate and the servants of appellant were fellow-servants, and whether the deceased came to his death through one of the ordinary perils of his service, it should have submitted them to the jury by proper instructions; and that they can not be raised here for the first time.

[Opinion filed September 10, 1887.]

APPEAL from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

Messrs. LUKE H. HITE and BROWN & KIRBY, for appellant.

The accident was the result of the gross negligence of engineer Guess and his comrades, and no recovery can be had.

Even if appellant's servants were negligent, "it was the duty of Guess to so drive the engine as not to imperil his own safety," and if he drove the engine at a negligent rate of speed, or in other respects negligently, which materially contributed to the injury, he could not recover. I. C. R. R. Co. v. Patterson, 69 Ill. 650.

It is gross negligence to operate a locomotive engine after dark without a head-light. *Burling v. I. C. R. R. Co.*, 85 Ill. 18.

Since Guess disobeyed the rules of the company and was not in the exercise of ordinary care, he could not recover. *C., B. & Q. R. R. Co. v. Lee*, 68 Ill. 576.

It is indispensable to the right of recovery that Guess should have exercised ordinary care. *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510.

In cases where danger is to be reasonably apprehended, proof of positive or special care must be made to warrant a recovery. *C., B. & Q. R. R. Co. v. Olson*, 12 Ill. App. 245.

These faults, both of omission and commission, on the part of Guess, materially contributed to the injury, and in such case there can be no recovery. *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202.

Mr. M. MILLARD, for appellee.

The negligence of defendant's servants was wanton. The act of leaving a switch open in the night time and going beyond signaling distance, by a lot of employes who were using another company's track, can only be regarded as sheer recklessness.

There is a natural presumption that every one will act with due care, and that negligence can not be imputed to a person because he does not anticipate the contrary and provide against the consequences. *Thompson on Neg.*, p. 1172; *Ernst v. Hud. R. R. Co.*, 35 N. Y. 9; *Newton v. N. Y., etc., R. R. Co.*, 29 N. Y. 383; *Cleveland, etc., R. R. Co. v. Terry*, 8 Ohio St. 570; *Reeves v. Del., etc., R. R. Co.*, 30 Pa. St. 459; *Kellog v. Chicago, etc., R. R. Co.*, 26 Wis. 223; *Darmour v. Lyons*, 44 Iowa, 276; *Frahn v. Sears*, 12 Cal. 556; *Moulton v. Aldrich*, 28 Kan. 300; *Langan v. St. Louis, etc., R. R. Co.*, 72 Mo. 392.

PILLSBURY, J. This case was before us at a former term of this court, when a judgment in favor of the appellee was reversed for the action of the court below in admitting evidence deemed by this court to be inadmissible to establish the fact alleged that the servants of appellant committed the act that caused the death of appellee's intestate.

Upon a new trial in the lower court the appellee again recovered and the defendant below again brings the case here for review upon appeal. The principal facts claimed to exist are stated in our former opinion reported in 19 Ill. App. 55, and it is not necessary to again repeat them.

We will briefly notice the points made by counsel for appellant, upon which they base their conclusion that the judgment should again be reversed. It is first objected that the court erred in admitting improper evidence.

From the record it appears that one Bailey, while testifying for the plaintiff, expressed his conclusion, not, however, asked for by the appellee, that an engine and crew of the appellant went into the stock yards switch for stock and intimated that they left the switch open, or left it wrong.

Upon cross-examination counsel for appellant asked him how he knew it was wrong, when the witness answered, "because they told me so," and therefore the court was asked to exclude the answer, which the court refused to do at the time, but subsequently did withdraw it from the consideration of the jury.

The appellee can not be held to be prejudiced by the action of counsel in thus asking the witness to disclose the source of his knowledge or information concerning the condition of the switch, and such answer could not have any greater weight with the jury because it was not ruled out by the court until at a later stage of trial. The court directed the jury to disregard it, and that was all he could do. We can not hold that a defendant can call out incompetent testimony from a witness favorable to a plaintiff, and then have a judgment reversed, when the court excludes it because it may, perchance, have influenced the jury in their finding. To do so would give a party an opportunity to demand a reversal for his own action in eliciting testimony which might prejudice his own cause.

It is next insisted that counsel for appellee made improper remarks in the presence of the jury.

This objection is based upon the fact that counsel offered to prove what Snell, the engineer, said about the switch being left open by his crew, testimony held by this court to be incom-

petent in its former decision. It must be remembered that this court is not the court of last resort, and when it reverses a judgment and remands the cause for a new trial, no appeal lies to the Supreme Court on behalf of appellee to correct any error of this court. Therefore, upon a new trial in the court below, the appellee in the cause in this court, if he desires to insist that error was committed by this court, must lay the proper foundation for assigning error in the Supreme Court upon the action of the Circuit Court in following our decision and opinion. This was all that was done in this case, and the court below, out of abundant caution, while sustaining the objection to the offered proof, told the jury that they must not consider any statements of counsel of what was offered to be proved, but must be governed by the testimony of witnesses alone.

Under the circumstances of this case, we do not think that counsel exceeded the limits of strictly professional conduct in the assertion of the rights of his client to offer evidence deemed to be competent by him.

The third and fourth objections urged question the action of the court in giving the instruction asked by appellee and in modifying the fifth asked by appellant, and may be considered together.

Appellee's instruction was as follows: "The jury are instructed, that if they believe from the evidence that Levi Guess was killed in the manner stated in the declaration, through the fault of the defendant's employes in negligently leaving the switch open, and was exercising due care himself at the time, or if the jury believe from the testimony that the said Levi Guess was guilty of slight negligence contributing to his death, and that the employes of the defendant were guilty of gross negligence contributing to the death of the said Levi Guess, but that the negligence of the said Guess was slight and that of the defendant's employes was gross, when compared with each other, the plaintiff is entitled to recover, and the verdict should be accordingly."

The first objection to this instruction is that it presents only a partial view of the case, as the appellant insists that Guess

came to his death through one of the ordinary perils of his service, and in not submitting whether Guess and the servants of appellant were fellow-servants. It is to be noticed that Guess was not an employe of the appellant, neither is the action against his masier.

The appellant, *prima facie*, was a stranger to him, and if the appellant desired to raise the question suggested, it would seem that it should have submitted them to the consideration of the jury by proper instructions asked on its own behalf. No such course was pursued, but on the contrary, as appears from the record, the appellant was content to rest its defense upon the ground alone that Guess was guilty of such contributory negligence as to defeat the action. Again, it is said that the instruction assumes that the servants of the appellant negligently left the switch open. We do not so read the instruction.

The jury are required to find from the evidence that Guess was killed in the manner charged through the fault of defendant's employes in negligently leaving the switch open while he was in the exercise of due care at the time. The instruction leaves the jury free to find what the fact was.

It is also objected to the instruction that it allows the jury, in applying the doctrine of comparative negligence to the case, to find for the plaintiff, even if Guess was not in the exercise of ordinary care for his own safety at the time. This same objection is made to the modification of defendant's fifth instruction, in that it is made to conform to the principle of plaintiff's instruction in submitting the question of comparative negligence to the jury. Even if true, as suggested by counsel for appellant in argument, that it is much easier to criticise an instruction attempting to inform the jury what comparative negligence is, and in what state of the case the jury may apply it, than to draft one correctly embodying the doctrine, it must be admitted that since Jacobs' case in 20 Ill. 478, it has had a place in our jurisprudence, and is to-day a principle which is applied by the courts in determining the right of a plaintiff to recover for injuries caused by the negligence of a defendant, when the defendant insists upon and has

given evidence tending to prove that the negligence of the plaintiff also contributed to produce such injury.

Whatever may have been the apparent holding in former cases as to the necessity of instructing the jury upon this question, the rule as now held, appears to be that it is not indispensable to a right of recovery that the question of comparative negligence be submitted to the jury by the plaintiff, but, if the circumstances of the case are such that the doctrine can be applied to the case, either party may ask the court to inform the jury as to the rule and in what state of the evidence they may consider it in determining the right of the parties. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358; *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586.

From these decisions it will be seen that a plaintiff may, if he desire, rely upon the doctrine of contributory negligence as applied in the courts of England and in most of the States of the Union; that is, that if the plaintiff has exercised ordinary care for his own safety, and the defendant has been guilty of negligence which primarily resulted in the injury to the plaintiff, he may recover, but if the evidence is such that it leads to the conclusion that the plaintiff was also somewhat negligent, then, if he desires, he may have the jury pass upon the degree of the negligence of the respective parties, and if they find that both parties have been negligent, then they are further told that they are to compare the negligence of the plaintiff with that of the defendant, and if, upon a full and fair consideration of all the evidence in the case, they find that the negligence of the plaintiff was but slight, and that of the defendant was gross, upon such comparison being made, then the plaintiff is not debarred from maintaining his action.

It is thus seen that two conditions may exist where negligence of the defendant is the basis of the action, either one of which, if found to be a fact by the jury, will support the action of the plaintiff.

These conditions are: First, when the plaintiff has exercised the degree of care required—in this case ordinary care—and the defendant has been negligent, which negligence has been the proximate cause of the injury without regard to the degree

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of negligence; and second, where both plaintiff and defendant have been guilty of negligence contributing to the injury, yet the negligence of the plaintiff has been but slight, and that of the defendant gross, when compared with each other.

Now the plaintiff below, recognizing the fact that the defendant had proven certain facts from which the jury might perhaps find that Guess was not entirely free from negligence, asked the court to instruct the jury, in case they did so find, to pass upon the question of the relative degrees of negligence of the parties if both were negligent.

In other words, both of the conditions that we have already stated were submitted to the jury for their consideration with a view to have them ascertain from the evidence, whether the plaintiff had brought himself within either of them, so as to justify a verdict for him. We fail to find such error in submitting the case upon this point as calls for our interference.

The jury could not have understood from the manner the court submitted the question to them, that the plaintiff could recover if Guess had failed to exercise ordinary care to protect himself, for, as we have said, the defendant made its defense substantially to rest upon the ground of his failure in this respect, and at its request the court stated to the jury in the second, third, fifth, sixth and tenth instructions given for appellant, the effect of the negligence of Guess upon the right of recovery in the cause, and in such clear, pointed and positive terms that appellant can have no cause for complaint that the court, on behalf of the plaintiff, allowed the jury to pass upon the question of the comparative negligence of the parties.

Indeed, the negligence of Guess was made such a prominent factor in the case by appellant, both in the evidence and the instructions asked and given, that it is difficult to understand how the ingenuity of counsel could have presented it in any stronger light for the consideration of the jury.

They were told that if Guess failed to exercise "ordinary care," or was guilty of more than slight negligence, or was guilty of gross negligence, or failed to obey the rules of his own master in approaching the crossing, and that obedience to them would have prevented the injury, or, if he could have

prevented the injury by ordinary care upon his own part and failed to exercise it, in either case the verdict should be for the defendant. What more upon this point could the defendant below ask or expect at the hands of the court?

It is urged that the verdict is against the evidence, and for this reason a new trial should have been granted.

It was not seriously contended on the trial below, and is not in this court, but that the jury was justified in finding from the evidence that the servants of the appellant failed to connect the switch with the main line after passing upon the stock yards track with their train.

The jury undoubtedly came to the conclusion that leaving a switch disconnected from the main track upon which trains of another company are liable to pass at any time, may well be denominated gross negligence, if not to be characterized as criminal in the one guilty of the act. Such act is so terrible in its consequences to life, limb and property that courts and juries can not be expected to look upon it with any degree of toleration, or to be very alert or anxious to find some plausible excuse for its commission. It would be extremely difficult, if not impossible, to conceive a state of case that would excuse or palliate the act. The appellant, indeed, does not attempt such a task in this court, but as we have seen, relies upon the contributory negligence of Guess to defeat the action. This question was passed upon by the jury and, we think, they were justified in finding that the negligence of Guess, admitting that he was negligent, was but slight compared with that of the servants of appellant. Even if he was negligent, the act of appellant's servants was so extremely so as to make a most fitting case for the application of the doctrine of comparative negligence. Under the instructions, also, they must have found that even if Guess had obeyed the rules of his master in all respects, and otherwise had exercised ordinary care, the injury would not have been prevented thereby, and we are not disposed to hold that such conclusion does not find support in the evidence.

It is urged here for the first time that Guess was a fellow-servant of the servants of appellee, and also that he was injured

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by one of the ordinary hazards of his employment. Without going into any extended discussion of the rules underlying these propositions, we think they partake more of questions of fact than of law and should have been made in the court below by proper instruction, defining who are fellow-servants and what are the ordinary perils of the business assumed by an employe, and thus called upon the jury to ascertain from the proofs whether the facts of this case brought the deceased within the principle governing either of the propositions. This was not done, but appellant was content to rest its entire defense upon the ground repeatedly stated herein, and having done so, it ought to be held to have waived other defenses that it might have urged before the court below.

The evidence of the plaintiff below considered by itself, would not justify the inference that Guess was injured either by the negligence of a fellow-servant or from one of the ordinary perils of his business, as the action is not against his own master but another company, but if the business relations were such as to bring Guess within the defenses claimed, or either of them, it devolved upon appellant to submit the facts to the jury under proper instructions for their guidance. *C., B. & Q. R. R. Co. v. Bell*, 112 Ill. 360.

It may be said, however, that it is not made to appear that Guess and the servants of appellant were within the rule stated in *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, that requires that the servants of the same master, to be co-employes, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business—*i. e.*, the same line of employment—or that their usual duties shall bring them into habitual association, so that each may exercise a mutual influence upon the other, promotive of proper caution.

We find no such error in the record as calls upon us to again reverse the judgment, and it will therefore be affirmed.

Judgment affirmed.

OSCAR CRAMER AND ELIZABETH CRAMER

V.

WILLIAM BODE AND FREDERICK JOBUSCH.

Husband and Wife—Settlement—Bill to Subject Property in Wife's Name to Lien of Judgment against Husband—Default—Extent of Admission—Defects in Bill—Transcript of Justice's Judgment Filed in Circuit Court—Requisites.

1. The default of a defendant in a bill in equity is an admission of facts alleged in the bill, but not of the pleader's conclusions from such facts.

2. A settlement of property by a husband upon his wife, when he is solvent and the settlement reasonable, can not be attacked by subsequent creditors, unless such settlement was made with a view to future fraudulent indebtedness.

3. To entitle a party to a transcript from a Justice to file in the Circuit Court to obtain a lien upon the realty of the judgment debtor, execution must be first issued by the Justice within one year from the rendition of the judgment, and returned *nulla bona*.

4. Upon a bill to subject certain real estate, standing in a wife's name, to the lien of a judgment against her husband, it is *held*: That it does not appear from the bill that the lien of the judgment was perfected by the issue of execution within a year from its rendition; that the bill is defective in not showing what proceedings were had before the Justice and certified to the Circuit Court; that the averment of time when the indebtedness accrued, leaves it uncertain whether it was prior or subsequent to the conveyance to the wife; and that the decree is too broad in setting aside the conveyance which is valid as between the parties, except as to creditors, if any, who have been hindered or delayed in the collection of their claims.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of Monroe County; the Hon. GEORGE W. WALL, Judge, presiding.

This was a bill in equity exhibited in the Circuit Court of Monroe County by defendants in error as partners, against the plaintiffs in error, to subject certain real estate in the name of Elizabeth Cramer to the lien of a judgment against her husband, the said Oscar.

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A decree *pro confesso* was entered and this writ of error is prosecuted to have it reviewed.

The bill avers that on March 16, 1882, one Henry Winterman sold the said real estate to said Oscar for the sum of \$600, and with the intent to hinder and delay his creditors, the said Oscar requested said Winterman to make the deed to his wife, the said Elizabeth, and that the deed was so made.

Concerning the accruing of the indebtedness and the recovery of judgment thereon, the bill charges "that the said Oscar Cramer, long before and afterward, at the time said purchase of said lots was made, opened an account at the store of complainants, of which a balance remained due upon final settlement, and for which balance, before Charles Metzger, a Justice of the Peace, on the 9th day of April, 1884, the complainants commenced suit, and on the 16th day of April, 1884, a judgment in favor of said complainants was entered in said cause for the amount of \$70.25 and costs of suit against said Oscar Cramer; and your orators further show unto your honor that on the 30th day of July, 1885, at 11:45 o'clock A. M. of said day, a transcript of the judgment and proceedings before said Justice in said cause, was filed and recorded in the office of the Clerk of the Circuit Court of Monroe County, Illinois, and thereby became a judgment in the Circuit Court of said county, and thenceforth was, and continued to be, a lien against all of the real estate of said Oscar Cramer in said county; and that afterward, on the 30th day of July, 1885, the said judgment remaining in full force and effect, and the damages and costs aforesaid unsatisfied, your orators, for the purpose of obtaining satisfaction of the same, caused a writ of *fiery facias* to be issued and delivered to the Sheriff of the said County of Monroe to serve, and out of the goods and chattels, lands and tenements of said Oscar Cramer, according to law, said Sheriff was commanded to make the sum of \$70.25, with interests and costs, and that he return the same into the office of said Circuit Clerk, together with his indorsement thereon, showing the manner in which he has served the same."

Upon these allegations arises the question noticed in the

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opinion which renders any further statement of the contents of the bill unnecessary.

The decree declares the deed to said Elizabeth to be null and void, that the property is that of said Oscar and subjects it to sale upon the execution of defendants in error.

MR. WILLIAM WINKLEMAN, for plaintiffs in error.

MR. JOSEPH W. RICKERT, for defendants in error.

PILLSBURY, J. It may be considered as settled law in this State that a settlement of property by a husband upon the wife, where the husband is solvent and the settlement reasonable considering the grantor's circumstances, can not be attacked by subsequent creditors of the husband but can be held voidable by creditors only who were such at the time of the conveyance, unless it shall appear that such settlement was made upon the wife with a view to future fraudulent indebtedness. *Moritz v. Hoffmann*, 35 Ill. 553; *Wooldridge v. Gage*, 68 Ill. 157; *Patterson v. McKinney*, 97 Ill. 41; *Crawford v. Logan*, 97 Ill. 396.

It is equally true that before a bill, like the one at bar, can be maintained, the proof must show that the judgment is a lien upon the land, and to show this it is indispensable that execution should have been issued within a year. *Newman v. Willits*, 52 Ill. 98; *Weis v. Tiernan*, 91 Ill. 27. Applying these well established principles to the case at bar how stands the case?

The defendants below by suffering a default admitted no facts not alleged in the bill.

The conclusions of the pleader from the facts stated were not admitted. The averment of facts is for the pleader; the legal conclusion arising from such alleged facts upon a default, is for the court.

The averment of time when the indebtedness accrued to the complainant below is so uncertain that the court could not judicially know whether it was prior or subsequent to the conveyance from Winterman to Mrs. Cramer. It is nowhere

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alleged that this settlement upon the wife was unreasonable, or that, at that time, the said Oscar was insolvent, not retaining a sufficient amount of property to pay all existing indebtedness. It is alleged that at the time of filing the bill he was insolvent, but when it is seen from the bill that the conveyance was made to the wife some two years and four months before judgment was rendered, the pleader should have shown that the debtor was insolvent at that time, or that he was at that time indebted to the complainants.

The allegation of indebtedness is, "that the said Oscar Cramer, long before and afterward, at the time said purchase of said lots was made, opened an account at the store of complainants, of which a balance remained due upon final settlement, for which balance judgment was obtained."

Now, whether this balance was for that part of the account accruing before the conveyance or afterward, does not appear, and taking the pleading most strongly against the pleader it is quite as clear that the account was opened with complainants at the time of, or after the conveyance, as it was before. If at the time or afterward, then the pleader should have gone further and shown by his bill that this conveyance was given to the wife in contemplation of future indebtedness, and for the purpose of preventing the collection thereof.

Upon the second branch of the case it is to be noticed that the judgment before the Justice of the Peace was rendered on the 16th day of April, 1884, and the transcript was filed in the clerk's office on the 30th day of July, 1885, over one year and three months after its rendition.

To entitle a party to a transcript from a Justice of the Peace to file in the Circuit Court for the purpose of obtaining a lien upon the realty of the judgment debtor, it is essential that execution be first issued by the Justice and a return *nulla bona* by the Constable. Rev. Stat. 1874, Chap. 79, S. 95. And in analogy to the limitation prescribed by the statute in the issuing of executions upon judgments in courts of record, in order to preserve the lien of the judgment upon realty it is incumbent upon the party to have such execution issued by the Justice within one year from the rendition of the judgment, otherwise his only remedy is a suit upon the judgment,

as taking a transcript after that time will not create a lien upon real estate although filed in the office of the clerk of the Circuit Court. Hay v. Hayes, 56 Ill. 342. There is no direct averment in the bill before us that any execution was ever issued by the Justice of the Peace, much less that any such was issued within a year after the entry of the judgment. The averment is that on the 30th day of July, 1885, a transcript of the judgment and proceedings before said Justice was filed and recorded in the office of the clerk of the Circuit Court, etc.; then the statement follows that said transcript thereby became a judgment of the Circuit Court and was thenceforth a lien upon the lands of said Oscar. By the averment that a "transcript" of the judgment and proceedings had before the Justice was filed, we can not infer that an execution was issued within a year upon the judgment and returned *nulla bona*, for the averment would be as well established without proof of such execution, as with it. A transcript, *i. e.*, a copy of such judgment and proceedings, can be filed without obtaining a lien upon real estate of the judgment debtor. The difficulty with the bill in this respect is, that we are not informed by it what "proceedings" were had before the Justice and certified to the Circuit Court.

The conclusion of the pleader that a lien was created by filing and recording such transcript is not admitted by the default, for the facts alleged do not necessarily legally lead to such conclusion.

The decree, also, we think, is too broad in setting aside the deed to Mrs. Cramer and finding the land belongs to Oscar, the husband, for such deed is good between the parties and should be held valid except as to creditors who have been hindered or delayed thereby in the collection of their just claims.

For the reasons stated we are of the opinion that error was committed in entering the decree upon the averments in the bill, for which the decree will be reversed and the cause remanded with leave to complainants to amend their bill if they shall be so advised, and for further proceedings according to the usual course of chancery practice and proceedings.

Decree reversed.

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THE NIAGARA FIRE INSURANCE COMPANY

V.

ELIAS J. BROWN.

Fire Insurance—Stipulation—Waiver by Local Agent—Estoppel.

In an action on a policy of insurance issued upon a stock of goods, it is *held*: That the stipulation signed by the agent of the defendant and attached to the policy by him, regarding the proper and safe keeping of books of purchases and sales and inventories, might be waived by him; that the evidence sustains the finding of the court below that it was so waived; and that the defendant is estopped to claim a forfeiture for the failure of the plaintiff to comply with its conditions.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Franklin County; the Hon. DAVID J. BAKER, Judge, presiding.

In August, 1886, the appellant, by its agent at Benton, Illinois, issued to the appellee its policy of insurance upon his stock of goods in the sum of \$1,450, and upon the store fixtures and furniture the sum of \$50. On the night of November 8, 1886, the store was burned, together with its contents, and the appellant refusing to pay the loss, this action was brought to recover upon the policy. The defense interposed is that the insured did not comply with the stipulation attached to the policy by the agent of the company and signed by him regarding the proper and safe keeping of books of purchases, sales, inventories, etc., but allowed them to be consumed in the fire that burned the building. The stipulation so far as relied upon is as follows:

“It is a part of the consideration of this insurance, and it is expressly warranted, that the assured above named shall take an inventory of the stock above described at least once a year, and shall also keep books of account, in detail, showing all the purchases and sales of the same, and shall keep all inventories and books in a fire-proof safe, or other place secure

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from fire in said store, during the hours said store is closed for business, or this policy shall be void.”

The appellee did not keep his books in such safe but the same were burned in the store.

In answer to this defense it is asserted that it was never the intention of the parties that this stipulation should be regarded or complied with and was therefore waived. Upon a trial before the court, a jury being waived, judgment went for the plaintiff below and the company appealed.

Messrs. WILLIAM S. CANTRALL and THOMAS BATES, for appellant.

Mr. F. M. YOUNGBLOOD, for appellee.

PILLSBURY, J. There was an intimation, rather than a direct charge, made upon the argument that appellee was responsible for the fire that destroyed his property, but upon examining the evidence we do not discover any foundation for it. While it is true that he was absent at the time of the fire, such absence is fully accounted for, as he was called to Benton to answer an attachment against him for contempt of court. The only point relied upon in the argument for a reversal of the judgment, is that the failure to keep his books in a fire-proof safe or other secure place according to the condition of the policy avoids it. To this point the appellee replies that it was not expected or intended that such condition should be complied with, and that its fulfillment was waived by the agent of the appellant. It appears from the evidence that one J. F. Mason, the agent of appellant at Benton, called at the store of the appellee and solicited him to renew his insurance upon his goods, his policy in the same company for \$2,500 for the preceding year having expired.

In the preceding policy there was no stipulation of the character here involved. Appellee informed Mason that he would carry his own risk in the future, but upon further persuasion he consented to take a policy for \$1,500, and the one in question was written in pursuance of such arrangement.

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When this policy was delivered to appellee there was attached to the margin by a common brass pin, a printed slip, containing what was called a three-fourths value clause and also the stipulation in question referring to the safe keeping of invoices, books, etc., which slip was signed by Mason alone as the agent of the company: Detaching this slip by withdrawing the pin would still leave the policy complete upon its face, and of the same character used in the preceding year in insuring the stock of goods in the same store. This slip being alone signed and attached by Mason in the manner stated, we have no doubt of his authority to detach it or withdraw it entirely, if he should so desire.

Whatever may have been his private instructions from the company regarding the attaching slips containing such stipulations to policies upon goods in country stores, it will not be disputed, that if he had delivered the policy to appellee without such, the underwriter could not have successfully defended the action because it was not attached as ordered.

If the agent had the power to bind the company by detaching it entirely, we think he could waive the performance of it and still leave it physically pinned to the policy, at least as he alone signed and attached it, and the policy made out and delivered by him without it would be valid. The apparent authority was such, that if he waived the performance of its conditions or gave the assured to understand that it would not be insisted upon and then took the premium and delivered the policy, the appellant would be estopped to claim a forfeiture upon the ground that the stipulation had not been complied with.

We have then only to inquire whether there is sufficient evidence in the record to uphold the finding of the court below; that a literal compliance with the stipulation did not forfeit the policy, as no questions of law arise upon the record for our consideration.

The only witnesses testifying upon this branch of the case are the plaintiff below and the agent, Mason.

He, the plaintiff, states that he told Mason he could not comply with the terms contained upon the slip; that he had no fire-proof safe, and that there were none in Mulkey Town,

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where the store was located, and that he was informed by Mason that it was not required in country stores. He says he is not sure that this talk took place at the time or before the policy was taken out. Mason admits that this conversation about the safe occurred, but thinks it was when the first policy was taken out about a year before, when Brown told him he had no safe and he then told him that would not make any difference. He further says at the time he issued this policy he did not see any fire-proof safe, and thinks there was nothing said about it as they had talked about it before and he supposed Brown understood it. He thinks, however, that in the talk he had with Brown he told him how unsafe it was to leave books, etc., in the house to be consumed by the same fire that destroyed the building:—that when a man had no safe he had better take those things home with his bills.

He is evidently mistaken as to the time when this conversation took place, as at the time the first policy was issued the appellant had not adopted any such clauses to be attached to or put in its policies as those contained on this attached slip; neither did the policy then issued contain any such.

It is more reasonable to suppose that it occurred as stated by Brown, as the first knowledge he had of such requirements was when he first saw the policy and the attached conditions.

They would scarcely be talking about the necessity of keeping a fire-proof safe in which to keep the books or of taking them to the residence of the assured, when the insurer had not required any such action by the insured.

It further appears that Mason, the agent, went to Mulkey Town on the Saturday preceding the fire to insure another party, and in consequence of some things that had been said to him about this risk, he made it an object to go and look at the goods, examine the risk and see if there was anything wrong about it, or, as he expresses it, "it was my particular object to see if all was right." He says that at this time the stock of goods was estimated by him to be worth as much as when the policy was issued, about \$2,500.

At this time he knew that Brown had no safe in which to keep his books, invoices, etc., but although he went to Brown's store for the express purpose of seeing if everything was all

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right about the risk, he seems to be fully satisfied that it was, from the fact that the stock insured had not depreciated in value, but far exceeded the amount of the insurance. If he had not waived the stipulation now insisted upon and he had considered the literal performance of it by the assured as material to the risk, it seems strange, indeed, that he had not inquired of Brown, who was then there, what care he took of the books, etc. It seems from such action that in this regard he only considered this stipulation material as furnishing the means of determining the amount of goods on hand at any given time, and having ascertained from personal inspection that the value of the goods so far exceeded the amount of the policy that no temptation could arise for Brown to destroy them, neither he nor his company had any further interest in such condition or stipulation. At this time, so far as appears from the record, he could easily have ascertained whether any of the material representations, conditions, warranties or stipulations contained in the policy were being violated by the assured, and when it is considered that he went to Brown's store for the purpose of ascertaining the present condition of the risk, and the action of the appellant through its agent in determining for itself the value of the goods in the store, we are not prepared to say that the court erred in holding that the ground of forfeiture of the policy now insisted upon was waived and the insurer liable.

The proof is amply sufficient to show that the goods destroyed so far exceeded the amount named in the policy that the plaintiff can not avail itself of the clause requiring it to pay only three-fourths of the value, and indeed, it is not contended that the testimony does so show, but because the value is not ascertained in the manner provided for, the insurer resists the claim.

So far as we can see the loss was an honest one and far exceeding the amount necessary to require the company to pay the face of the policy, and the court below having settled the facts in favor of the appellee upon evidence sufficient to sustain the finding, we affirm the judgment.

Judgment affirmed.

Stewart v. School Directors.

VICTORIA STEWART
V.
SCHOOL DIRECTORS.

Public Schools—Special Contract to Teach—Evidence—Practice.

In an action by a teacher upon an alleged special contract to teach for one month after the expiration of her regular term, it is *held*: That the evidence sustains the verdict of the jury for defendant; and that there was no error in permitting the jury to pass upon the evidence and return a verdict without leaving the court room, after a refusal of the court to pass upon a demurrer to the plaintiff's evidence.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of Jasper County; the Hon. WILLIAM C. JONES, Judge, presiding.

Messrs. HONEY & HALLEY, for plaintiff in error.

Mr. GEORGE W. FITHIAN, for defendants in error.

GREEN, P. J. Plaintiff in error brought suit before a Justice of the Peace, to recover for services as teacher in said school district. A judgment for her was rendered in that court from which the Board of Directors appealed to the Circuit Court, where a trial was had, resulting in a verdict and judgment for defendant, to reverse which this writ of error was sued out. Plaintiff taught school in said district four months and two days, commencing in October, 1885. She was paid in full for four months' services, but claims the right to recover salary for one more month, upon the ground said Board of Directors, by special contract, employed her to teach for five months and wrongfully discharged her before that term expired.

The only contract between the parties was made at a special meeting of said Board, held August 4, 1885, the proceedings of which special meeting were read on behalf of plaintiff as follows:

Stewart v. School Directors.

“ August 4, 1885.

“ At a special meeting of the Directors, Victoria Stewart was hired to teach four months' school at \$25 per month, to commence on the last Monday in September, or the first Monday in October, 1885, as the Directors shall hereafter decide.

“ N. S. CLARK, clerk.”

In addition to this, plaintiff testified that at said special meeting the Directors employed her to teach a four months' school, and promised to give her a fifth month if she gave satisfaction. Two other witnesses also present at said special meeting, testified substantially as she did. Towland, one of the Directors, testified, “ at that meeting we employed her for four months at \$25 per month. After the business of the meeting was transacted and the Board had adjourned, Miss Stewart said something about a fifth month, and I said, if she gave general satisfaction, we would give her a fifth month, but the other two Directors did not say anything.” “ We only hired her to teach a four months' school.” Noah Clark, another Director, testified he made the minutes of that meeting, and that the record read in evidence was a correct record of the proceedings. The whole of this evidence was introduced on behalf of plaintiff and comprises the substance of all that transpired at that special meeting touching her employment to teach. Even taking her own version, corroborated by the two witnesses whose recollection agreed with hers, and the fact is not thereby established that a specific contract was made with her by the Board to teach a term of five months, and taking all the evidence together, the jury could properly find that plaintiff was employed to teach for a term of four months only. It also appears by the evidence, that on the night of the last day of the four months' term, Towland, one of the Directors, told her that the two other Directors were opposed to her having a fifth month's school, and as he was alone he could not do anything. With this notification she could have no excuse for misunderstanding when her term to teach expired, and if she chose to teach for two days thereafter without the consent, and, so far as the record discloses, without the knowledge of the Directors, she did so without

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authority and can not legally demand pay therefor; nor was she wrongfully discharged by the Board; her term of employment having expired, the Board had the right to employ another teacher, and demand and take from her the keys and register, to be given to her successor.

The defendant offered no evidence on its behalf, and it is assigned for error that the court failed and refused to pass upon a demurrer to the evidence interposed by counsel for defendant when plaintiff had rested, but permitted the jury to consider the evidence introduced and permitted the jury to find and return a verdict without leaving the court room. We perceive no error in this, or in giving the instruction to the jury given on behalf of defendant. *School Directors v. Jennings*, 10 Ill. App. 643.

The loose talk between plaintiff and Director Towland and between her and Director Clark, had a week or two before the expiration of the four months' term concerning her continuing to teach a fifth month did not change her contract with the Board, and she having failed to prove such contract of employment to have been for a longer term than four months, and having been paid in full for teaching that term, had no right to recover in this suit. The jury so found, and the court rightfully rendered judgment on the verdict. The judgment is affirmed.

Affirmed.

BOARD OF TRUSTEES
V.
JAMES D. BAKER ET AL.

School Funds—Loan—Security—Duty of Township Treasurer—Action on Official Bond—Estoppel.

1. The power to determine the validity and sufficiency of the required security for school funds loaned, is vested by Sec. 57, Chap. 122, R. S., in the township treasurer.

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2. In an action on the official bond of a township treasurer, the breach assigned being the failure of the principal to take sufficient mortgage security for school funds loaned by him, it is *held*: That a plea to the effect that the loan was made upon said security at the request of the Directors constitutes no defense; and that the district is not estopped by the unauthorized acts of its officers.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. W. C. KUEFFNER, for plaintiff in error.

A "request" by the Board of Education on the treasurer to loan district funds on insufficient security, does not protect him. The Board of School Directors, though a corporation, are possessed of certain special defined powers and can exercise no others, except such as result, by fair implication, from the powers granted. As a corporation they are but the agents of the taxpayers and inhabitants of the district in which they are organized. Every official act performed by them is for their constituents, these inhabitants and taxpayers, and, for doing this act, they must show, when questioned, their authority. *Glidden v. Hopkins*, 47 Ill. 525; *Wells v. The People*, 71 Ill. 532; *Newell v. School Directors*, 68 Ill. 514.

"These bodies can exercise no other powers than expressly granted, or such as may be necessary to carry into effect a granted power. And it is fortunate for the people this power is so restricted." *School Directors v. Fogleman*, 76 Ill. 189.

"A 'request' to loan district school funds, not signed by a majority of the Board, nor by the officers of the Board, and not entered on the journal, is no valid document for any purpose." *Glidden v. Hopkins*, 47 Ill. 525.

MESSRS. MARSHALL W. WEIR, DILL & SCHAEFER, and WILDERMAN & HAMILL, for defendants in error.

Mr. Baker is not charged with knowing, or even suspecting, the security was not sufficient. A treasurer can not, from the nature of things, know the value of all the real estate that

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may be offered as security for loans. It may frequently happen that personally he knows nothing of the value of land offered. In such cases he must inform himself by the means usually employed for that purpose—the judgment of other men. Men equally competent to judge differ widely in their estimates of the value of a given tract of land. The members of a School Board are presumed to be men of average intelligence. In this case the Board took it in hand to examine the security; they report it “ample,” and being officers under the school law, they know what security is required; by the word “ample” they must be understood to mean “what the law requires.”

If the matters stated in the third plea are true—and they are admitted to be—it would be an act of injustice, we submit, to hold the treasurer liable for any loss that may have resulted from the loan. After examining the land and pronouncing it ample security, and directing the treasurer to make the loan, it certainly does not lie in their mouths now to say, that the treasurer had no business to make the loan, especially when they would thus entail a loss on the treasurer who acted in the utmost good faith on their directions.

WILKIN, J. This was a suit below on the official bond of defendant in error, James D. Baker, as Township Treasurer, to recover certain funds belonging to school district number three in his township. The breach assigned in the declaration is, that there came to the hands of the said Baker as such treasurer, money belonging to said district three; that it was his duty not to loan the same except on mortgage security on unincumbered real estate in value at least double the amount of money loaned; that in violation of that duty he did, on the 28th of November, A. D. 1881, loan of said funds of said district three, to one Silas Smith \$3,500, and took no other security, except a note of said Smith, secured by mortgage of said Smith and wife on the undivided one-half of 200 acres of land, which was not then, and has not since been, equal in value to double the amount of money so loaned on it; that said mortgage has been foreclosed and the mortgage property

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sold thereunder for the sum of \$2,500, leaving a large amount of said loan unpaid and which remains unpaid; by means whereof the said district three has been, and is deprived of said money.

To this breach defendants in error filed, among others, this plea.

“That before making said loan to said Silas Smith as aforesaid, the Board of Education of said district number three made and delivered to the defendant Baker a request in writing to loan said sum of \$3,500 to said Silas Smith on said real estate security, which request was in the following words and figures, to wit:

“‘LEBANON, ILLINOIS, November 5, 1881.

“‘J. D. BAKER, Treasurer of School Fund, Town two North, Range six, West.

“‘*Dear Sir:*—Mrs. Hoffman wishes to borrow \$2,000. Will give real estate security in Clinton County. Silas Smith also wishes to borrow \$3,500; will give real estate security in this county. The security in each case we think is ample, and as our district has a surplus fund on hand we most respectfully request you to make the above loan at six per cent. per annum for the term of three years.

J. M. CHAMBERLAIN,
LUTHER BROWN,
JOHN LUPTON,

Members Board of Education, School District No. 3.’

“That said request was given at the direction of said Board, and after said Board had, through a committee of its members, inspected said Smith’s land; and that said Baker made said loan upon and by virtue of said written request; and that the security referred to in the foregoing request as to the loan of said Smith is the same land described in the plaintiff’s declaration, and on which said mortgage was taken.”

A demurrer to this plea being overruled, and plaintiff below electing to stand by the demurrer, final judgment was rendered against plaintiff, and the suit dismissed. It is here insisted that the court erred in overruling the demurrer to that plea, and that is the only question we are called upon to determine.

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The duty of township treasurers as to the kind and amount of security to be by them taken upon the loan of money in their hands, is clearly defined by Sec. 57, Chap. 122, R. S. : "For all sums not exceeding \$100, loaned for not more than one year, two responsible securities shall be given; for all sums over \$100, and for all loans for more than one year, security shall be given by mortgage on real estate unincumbered, in value *double the amount loaned*, with a condition that in case additional security shall at any time be required, the same shall be given, to the satisfaction of the Board of Trustees for the time being. * * * Where there is a surplus of funds in the treasurer's hands belonging to any school district, he may loan the same for the use and benefit of said district, upon the written request of the Directors of said district, and not otherwise; *and all such loans shall be on the same conditions as are prescribed in this section for loaning township funds.*"

The plea admits the allegation in the declaration that the defendant Baker, in violation of this statute, as treasurer, did make the alleged loan, and failed to take a mortgage on real estate equal in value to double the amount of money so loaned, but which was of much less value, and seeks to avoid liability for such neglect of duty by averring that he acted in pursuance of the directions of the Board of Education of the district to which the funds belonged. There is no pretense of authority in law, to this Board of Education or Directors of districts, to determine what security shall be taken upon the loan of the district's funds. The statute clearly and explicitly imposes upon the treasurer the duty of making loans of such fund, upon request of the Directors, and commands him to take a certain kind, and in cases like the one in question, a certain *amount* of security. He can not relieve himself of liability for a neglect of that duty by following the directions of a body of officers having no authority to give such directions. In making this loan the statute required real estate security double in value the amount loaned.

If the Directors could bind the district in directing the loan to be made on real estate of less than double such value, why

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could they not do so by directing it to be made on personal security? or if they had regarded Smith personally good, by directing it to be made without security? There is as much power in the Directors to dictate to the treasurer the kind of security he shall take, as there is to determine the amount in value to be given when a mortgage on real estate is taken.

Brandt, in his work on Suretyship and Guaranty, Sec. 476, says: "The sureties of a government or corporation officer are not affected by the unauthorized acts of other officers of the government or corporation." Among other cases he cites and quotes from *Manley v. City of Atchinson*, 9 Kan. 358. The city ordinances of Atchinson prohibited the City Treasurer from using or appropriating to his own use the city funds. The Mayor and City Council, by resolution, authorized him to use certain of such funds, paying interest therefor, and this action of the city officers was set up in defense of a suit on the treasurer's bond, charging him with such misappropriation. The defense was held unavailing and from the judgment below the treasurer and his sureties prosecuted a writ of error to the Supreme Court. Kingman, C. J., in rendering the opinion of the court, says: "The whole fallacy of the argument of the plaintiff in error lies in confounding the Mayor and Council of the city with the city itself."

The \$1,000 which this plea admits was lost because sufficient security was not taken was the money of the district, not of the Board of Education. This suit is by the trustees for the use of the district to recover that loss. Therefore, all that is said by the defendant in error as to the bad morals of the Board of Education, and their stupidity in estimating the value of the security, is without force. The doctrine of estoppel has no application here. The case cited in 7 Ill. App. is clearly distinguishable from this, but as by statute it is only authority in that particular case it is unnecessary to comment upon its distinguishing features.

That public funds can only be loaned with safety to the interest of those to whom they belong by lodging the power to determine the validity and sufficiency of the required security in some officer to be held liable for losses resulting from the

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abuse or negligent exercises of that power, seems too plain to admit of argument.

By the statute above quoted that power is vested in the township treasurer in loaning school funds of the various districts of his township, and no provision is found in the statute by which that responsibility can be shifted to others. It imposes no onerous burthen upon him.

Its requirements are plain and unequivocal. The statute told him just what the proportionate value of the security should bear to the amount of money loaned. In estimating the value of the real estate, he was only required "to act in good faith and with due caution and circumspection." *The People v. Haines*, 5 Gilm. 528; *County of Green v. Bledsoe*, 12 Ill. 267, 270. If he had done so, and acting on his own judgment and information believed that the mortgaged premises were of double the value of the loan, he would not be liable. *Ibid.*

By this plea no one believed it of any such value. The treasurer did not take it because he believed it of double the value of the loan, but simply because he was requested to do so by the Board of Education.

The third plea presents no defense whatever to the declaration and the demurrer to it should have been sustained. The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

R. M. BLACKMAN ET AL.

V.

PRESTON BROTHERS ET AL.

Family Settlements—Voluntary Conveyances—Bill to Set Aside—Want of Notice—Fraud against Subsequent Creditors of Grantor.

1. Where the grantor, after the execution of a voluntary conveyance to members of his family, which is not recorded, is permitted to retain possession as the ostensible owner, such possession is *prima facie* evidence of fraud

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as against subsequent creditors who have given credit to the grantor upon the faith of his supposed ownership of the property.

2. The rule which sustains and upholds family settlements, securing to the husband and father the right to make suitable and proper provision for his wife and children by means of voluntary conveyances, requires such reasonable notice of such conveyances as will prevent the grantor from afterward practicing a fraud upon others.

3. In the case presented, it is *held*: That the failure of the grantees to record their deeds, while suffering the grantor to retain possession and control, pay taxes, receive the proceeds of the premises in question and obtain credit on the faith of his supposed ownership, renders their conveyances void as against the complainants, who are subsequent creditors.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of Saline County; the Hon. DAVID J. BAKER, Judge, presiding.

This was a proceeding below in chancery to subject certain real estate to the payment of judgments in favor of defendants in error against Calvin S. Blackman, one of plaintiffs in error, in which a decree was rendered as prayed and from which this writ of error was sued out. A reversal is here urged upon the ground that, under the facts proved, the bill should have been dismissed. The undisputed facts appearing from the evidence are, that prior to and on the 17th day of March, 1875, Calvin S. was the owner in fee and in possession of all the lands in question; that on that day he executed and acknowledged his two several deeds of conveyance, one to his son Samuel J., then about ten years old, for eighty acres, and the other to his son John Grant, then about six years old, for one hundred and twenty acres, the two hundred acres thus conveyed, then and ever since being known as the home farm of said Calvin S.; that on the 29th of October following he also conveyed by deed of that date to his wife, R. M. Blackman, the twenty acres also involved in this controversy; that these conveyances were voluntary gifts to the grantees; that when they were signed and acknowledged, Calvin S. was free from debt, and, at the time, did not contemplate the contracting of any debts whatever; that he did in fact, shortly thereafter, engage in mercantile business, in which he incurred

the liabilities to defendants in error described in their bill; that he continued to remain in the open, notorious and exclusive possession of the home farm and exercised at least some acts of ownership over the twenty acres to the time of the filing of this bill; that the same was during all of said time assessed in his name, and he paid the tax assessed thereon; that he received and used the rents, issues and profits of all of said real estate after said conveyances as before, rendering no account to the grantees therefor; that the deeds from the time they were executed remained in a family desk in the dwelling house of the family, and were not specially controlled by any one up to August 6, 1881, when they were filed for record; that within a week after the two first mentioned deeds were made, Calvin S., as he swears, called the boys up and gave them the deeds, explaining to them the land conveyed to each, and Samuel J. then put them in the desk. There is a conflict of evidence as to who filed the deeds for record, the recorder testifying that it was done by Calvin S. and giving very plausible reasons for the distinctness of his recollection of that fact. He is contradicted, however, by Calvin S. and by a son, Wm. H., who swears that he delivered them to the recorder by direction of his mother, who had some six weeks previously, delivered them to him. It is in proof that about the time the deeds were executed, there was more or less neighborhood talk about it, and that then and subsequently, it was understood by the friends and neighbors of the family that the home farm had been deeded to the younger boys, but there is no satisfactory proof that either of defendants in error or their agents, received any information of that fact. On the contrary the salesmen of the respective defendants in error, swear that Calvin S. told them that he owned it, and that he made that statement for the purpose of obtaining credit from them, and that they, relying upon the truth of such statement, did extend to him credit. These witnesses are contradicted by Calvin S. He does not, however, say that he at any time disclosed to them the fact that he had made the conveyances to his wife and sons. The indebtedness was incurred prior to the filing the deeds for record. After they

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were recorded, settlements were made between Calvin S. Blackman and each of the defendants in error, and he executed to each his notes, secured in part by mortgages on other real estate, and it is contended on his behalf that the security then given was ample, but the evidence shows that upon foreclosure and sale of the mortgaged premises, balances remained due to each of defendants in error aggregating the sum of \$2,276.67, the amount found by the decree below, and for the payment the lands in controversy are subjected, saving to Calvin S. Blackman his homestead rights therein.

Messrs. GREEN & GILBERTS, for plaintiffs in error.

Messrs. PARISH & PARISH, W. H. BOYER and MARSH & SCOTT, for defendants in error.

WILKIN, P. J. The position assumed by the learned counsel for plaintiffs in error is that inasmuch as the conveyances sought to be questioned by this bill were made when the grantor was free from debt and worth several thousand dollars in real estate and other property besides that conveyed, the evidence failing to show that they were made in anticipation of incurring debt to avoid the payment of which they were made, the deeds must be held valid. That such is the general rule of law can not be successfully controverted, nor do we understand counsel for defendants in error to call it in question. Notwithstanding the validity of the transaction originally, the failure to pursue it by placing the deeds on record, changing possession or otherwise giving notice of the transfer of ownership, by means whereof defendants in error were induced to give credit to Calvin S. Blackman, the conveyances would become fraudulent as to them, and upon this theory, if at all, the decree must be sustained. This proposition would seem to be in consonance with justice, and it certainly has the sanction of very high authority. "A deed not fraudulent at first may become so afterward by being concealed or not pursued, by means of which creditors have been drawn in to lend their money. * * * The omission to place a deed on record or leaving it in the hands of the grantor are

instances of secrecy within the rule." Bump on Fraudulent Conveyances, 39, 40; Wait on Fraudulent Conveyances, 324; Hunyeford v. Earl, 2 Vernon, 261; Scrivner v. Scrivner, 7 B. Mon. 374.

"Where the grantor, after the execution of a voluntary conveyance to his sons, is permitted to retain possession as the ostensible owner, and the conveyance is not recorded, such continued possession is *prima facie* evidence of fraud as against subsequent creditors who have given credit to the grantor upon the faith of his supposed ownership of the property." Bank of U. S. v. Housman, 6 Paige, 526.

The grantees in this case are volunteers. They paid nothing whatever for the land claimed. It makes no difference therefore, whether they consented to the perpetration of a fraud by their grantor or not. Having failed to record their deeds and suffering their grantor to remain in possession and control, pay taxes and receive the proceeds therefrom—in short, leaving to the world the same evidence of ownership after as before the conveyances, thereby enabling him to obtain credit on the faith of his ownership, they can not now be allowed to go back to the original transaction and base their title upon it to the injury of those who were thus induced to give such credit. We do not understand that this rule militates against that which sustains and upholds family settlements, securing to the husband and father the right to make suitable and proper provisions for his wife and children by way of voluntary conveyances when he is free from debt or retains sufficient property to meet his then existing liabilities. It only requires such reasonable notice of such conveyances as will prevent the grantor from afterward practicing a fraud upon others. We think the evidence in the record justifies the conclusion that defendants in error were induced to give credit to Calvin S. Blackman on the belief that he owned the land and that, as to them, the conveyances sought to be set aside were secret and therefore void.

Affirmed.

Winkelman v. Drainage District.

WILLIAM WINKELMANN
v.
DRAINAGE DISTRICT.

Drainage—Sec. 17, Chap. 42, R. S.

Under Sec. 17, Chap. 42, R. S., the jury may off-set benefits against damages for land taken for drainage purposes.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of Monroe County; the Hon. GEORGE W. WALL, Judge, presiding.

MR. WILLIAM WINKELMANN, in person, plaintiff in error.

MR. W. H. HORINE, JR., defendant in error.

WILKIN, J. Plaintiff below sued defendant in error in assumpsit for \$300, which he claims had been assessed to him as damages for land taken by it for the use of a levee in its district by a jury impaneled under the Drainage Act of 1879. The defendant pleaded that the \$300 so allowed as damages was off-set and deducted from benefits assessed by the same jury against plaintiff and that such benefits exceed the damages. No question is made by either party as to the regularity of the proceeding under and by which the assessment was made nor as to the fact that the jury assessed benefits to plaintiff's land \$536, and damages to the amount of \$300, and that the jury found the balance of benefits to be \$236. The judgment of the court below was for defendant and a writ of error was sued out of this court by plaintiff below. He now insists upon a reversal on the single ground that the jury had no power to off-set benefits against damages for land actually taken, as he terms it, and he relies upon authorities cited, holding that under that provision of our Constitution which prohibits the taking or damaging of private property for public use without just compensation, the land actually taken must

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be paid for regardless of benefits. The cases cited are each condemnation proceedings in which private property was sought to be taken for public highways or railroads' right of way and have no application to this case. This is not a taking of private property for public use within the meaning of Sec. 13 of Art. 2 of the Constitution. The object of the proceeding is to benefit the lands of owners within the district and to require each to pay for the improvement in proportion to the benefits received and is under the provisions of the statute passed under Sec. 31 of Art. 4 of the present Constitution, the amendment being adopted in November, 1878. Hence, by the express provision of Sec. 17, Chap. 42, the jury are required to off-set damages and benefits and carry forward the balance to a column for damages or benefits as the case may be. If the benefits exceed the damages they must be paid, as provided in Sec. 26 of the same chapter. No question is made in this case as to the legality of the assessment, either of damages or benefit. Hence the position of plaintiff in error is that he may recover the \$300 damages and the district the \$536 benefits, the result of which would be the same as is contemplated by Sec. 17. We find no reason or authority to support the position of plaintiff in error. The rights of the parties are fixed by the plain letter of the statute and the judgment of the Circuit Court is in conformity therewith and must be affirmed.

Judgment affirmed.

JOSEPH P. GRIFFIN, EXECUTOR,

V.

JOHN L. KEHRER.

Administration—Claim for Services—Practice—Appeal—Findings of Fact by Jury.

Upon an appeal by an executor from a judgment against an estate on a claim for work and labor, this court declines to interfere with the findings of the jury, no errors of law being raised.

Griffin v. Kehrler.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was a claim filed by the appellee in the County Court against the estate of Ira Manville, deceased, of which estate the appellant is the executor. The merits of the claim were contested in that court before a jury and a verdict was rendered for appellee, from which an appeal was prosecuted to the Circuit Court and, upon a trial in that court, the jury found the same way and the executor again appeals.

It appears from the record that the claim of the appellee was for work and labor performed for the testator in his lifetime, for which he had received no compensation. The defense most earnestly urged was that the work and labor claimed for were mere acts of neighborly kindness done without an expectation of procuring reward, or the intention of charging the testator for their value.

Messrs. MARSHALL W. WEIR and TURNER & HOLDER, for appellant.

Messrs. FRANKLIN A. McCONAUGHY and HAY & BARTEL, for appellee.

PILLSBURY, J. The question whether the services were performed as a mere gratuity was submitted to the jury upon the instructions asked by the defendant below, which presented the legal points in so clear a light that the jury must have understood the true issue between the parties.

No errors of law are raised by the record nor urged by counsel for appellant, but we are asked to reverse the judgment because the finding is against the weight of the evidence. A careful consideration of the evidence convinces us that there is sufficient proof in the record to sustain the finding, and that we should not interfere in this case unless we are prepared to do so in every case, where, perhaps, we might be disposed to determine the fact otherwise, were the question presented to us for decision in the first instance.

O. & M. R. R. Co. v. Emrich.

Some effect should be given to the findings of fact by a jury, and where two juries have found the same way upon a single question of fact, and about which they could not be misled, their verdict should not be set aside and their findings ignored, except when it is evident they have been actuated by passion or prejudice.

Nothing of that kind appears in this record, and we affirm the judgment.

Judgment affirmed.

THE OHIO & MISSISSIPPI RAILROAD COMPANY

V.

E. EMRICH.

Carriers—Loss of Goods—Action by Consignor—Parties—Liability of Carrier beyond its Line—Special Contract—Receipt—Question for Jury—Delivery to Connecting Line—Burden of Proof.

1. A common carrier, receiving goods to carry, marked to a destination beyond its line, is bound, under an implied contract, to carry and deliver at the place marked. But this common law liability may be restricted by contract fairly made.

2. It is a question for the jury whether the terms of a receipt or bill of lading limiting the carrier's liability to its own line was fairly made, understood and assented to by the assignor.

3. The consignor of goods intrusted to a common carrier may maintain an action for a failure to carry and safely deliver, the contract for transportation being with him.

4. In the case presented, it is *held*: That the evidence proves ownership of the goods in question in the consignor; that upon its own construction of the contract, the burden of proof was upon the defendant to show a safe carriage to the terminus of its line, and a delivery to a connecting line; and that the evidence fails to show such delivery.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Wayne County; the Hon. C. C. BOGGS, Judge, presiding.

MESSRS. POLLARD & WERNER, for appellant.

O. & M. R. R. Co. v. Emrich.

“When a bill of lading, given on the acceptance of goods by a carrier, shows they are to be forwarded to a particular place only, which is short of their place of destination, and the consignor has been a frequent shipper by the same line, and was in the habit of receiving like bills of lading, it will be presumed he was familiar with its contents, and knew the carrier was not under obligations to carry the goods to the place to which they were marked.” *Merchants’ Des. & Tr. Co. v. Moore*, 88 Ill. 136; see also *C. & N. W. R. R. Co. v. Church*, 12 Ill. App. 17.

If the contract, then, was to carry to Cincinnati and there deliver to a connecting carrier, is a breach shown by showing non-receipt of goods at destination? We think not. *Hutchinson on Carriers*, Sec. 760; *Gibart v. Dale*, 5 Ad. & El. 543. Bill of lading shows that the goods were consigned to E. Emrich, and the presumption is that the title vested in the consignee immediately upon delivery to the carrier by the shipper. *Peun. Co. v. Poor*, 103 Ind. 553; *Blum, Frank & Co. v. The Caddo*, 1 Woods (C. C.) 64; *Hutch. Carr.*, Sec. 130.

There is a complete delivery to a connecting carrier where the goods are deposited within the control of that carrier. *Pratt v. Grand Trunk R. R. Co.*, 95 U. S. 43; *Merriman v. Hartford & N. H. R. Q. C.*, 20 Conn. 354; *Hutch. Carr.*, Sec. 102.

Messrs. HANNA & ADAMS, for appellee.

When goods are delivered to a railway company or other common carrier marked to a particular place, whether beyond the company’s line or not, and the company receives them, then there is an implied contract on the part of the company to carry such goods to the destination marked, and this liability can not be limited or in any way modified by anything contained in the bill of lading, unless such different contract is agreed to, understood and assented to by the shipper. *I. C. R. R. Co. v. Frankenberg*, 54 Ill. 88; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Anchor Line v. Dater*, 68 Ill. 369; *Field v. C. & R. I. R. R. Co.*, 71 Ill. 458.

The question as to whether the shipper did make a contract

to ship the goods to a destination different from the one to which the goods are marked, is a question of fact for the jury; and the bill of lading is not evidence of that fact. *Field v. C. & R. I. R. R. Co.*, 71 Ill. 458; *L. C. R. R. Co. v. Frankenberg*, 54 Ill. 88.

WILKIN, J. About the 19th of November, 1886, appellee shipped a box of clothing over appellant's road from Fairfield, Illinois. It was marked Freehold, New Jersey, and consigned to his brother, E. Emrich.

Appellant's agent at Fairfield gave him a receipt for the box in which it is stated that it is "to be forwarded to Cincinnati, Ohio, station, upon the following conditions." One of these conditions is that the responsibility of appellant "shall terminate when delivered to the next carrier." There is no dispute as to the value of the goods nor as to the fact that they were lost. The judgment below was for appellee for \$100.

Appellant urges, with seeming earnestness, that appellee can not maintain this action, because, as counsel say, he was "only the shipper or consignor," and they insist that he must prove that he is the owner of the goods before he can sue for their loss. In other words, they assume that, inasmuch as the law presumes in the absence of proof that the consignee is the owner, therefore, the consignor can not sue. The legal position is untenable. The contract for the transportation being with the consignor he may sue for its breach in the failure to carry and safely deliver, whether he retains any property in the goods or not; the recovery being for the benefit of the consignee if he was the real owner. *Hutch. Carr.*, Sec. 736; *Great Western Railroad Company v. McComas*, 33 Ill. 185.

There is sufficient proof of ownership in the plaintiff below to entitle him to maintain the action, even if the law was as contended by appellant.

Appellee testified that he purchased the goods; that he bought more than the market at Fairfield would justify. On cross-examination he says, "I received this receipt for *my* box." On re-direct examination the question was asked him, "And you shipped them to your brother to Freehold, New Jersey, to sell for you." Answer. "Yes, sir." This evidence is suf-

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ficient to overcome a mere presumption, and prove ownership in appellee.

Appellant also insists that by the express terms of the receipt given for the box it only undertook to carry it to Cincinnati, Ohio, and that there is no evidence to show a failure to do so. On the other hand appellee contends that the box being marked to Freehold, New Jersey, and received by appellant, the contract in law was for a through shipment and that proof of loss at destination fixes the liability of the carrier.

The law of this State is that a common carrier receiving goods to carry marked to a destination beyond its line is bound under an implied contract, to carry and deliver at the place marked. *W., St. L. & P. Ry. Co. v. Jaggerman*, 115 Ill. 407, and cases cited. This is the common law liability which may be restricted by a contract fairly and understandingly made.

It is a question for the jury to determine whether the terms of a receipt or bill of lading, limiting liability to the carrier's own line, was fairly made, understood and assented to by the consignor. *I. C. R. R. Co. v. Frankenberger*, 54 Ill. 88; *Fields v. C. & R. I. R. R. Co.*, 71 Ill. 458. It does not necessarily follow, because the shipper accepted a receipt for the goods to be carried containing limitations of the carrier's liability, that he assents thereto. *Anchor Line v. Dater*, 68 Ill. 369.

No objection is made to instructions given. The questions of fact seem to have been fairly submitted to the jury and we see no reason for disturbing their finding.

It may be said that appellee should have known the contents of the receipt. It is evident, we think, that he did not, or, at least, that he understood that the goods were to be carried through as marked, and there is no pretense that his attention was directly called to the limitation in the receipt.

The evidence is sufficient to support the judgment below even on the theory that appellant was only required to carry to Cincinnati and there safely deliver to a connecting carrier. As before stated, the loss of the goods is not disputed; the proof is clear that they never reached their destination. Appellee swears, and it is not denied, that some four weeks after the shipment he applied to Mr. Foster, the agent of appellant at

Fairfield, to send a tracer for the box; that he reported that it could not be found; that he procured a second tracer and after some weeks the agent again reported that he could learn nothing of them. This proof is clearly sufficient to place the burthen upon appellant to show a safe carriage to Cincinnati and delivery to a connecting line, even on its construction of the contract. In *Adams Express Co. v. Stettaners*, 61 Ill. 187, it is said: "When the goods fail to reach their destination and the carrier does not show the manner of their loss, the presumption arises against him of want of ordinary care. This rule is reasonable and just. The carrier alone has it in his power to show what has become of the goods or why they were not duly delivered. He has the means of tracing them from the moment of their shipment; the shipper has not."

Appellant attempted to make proof of the safe arrival at Cincinnati and delivery to another line, by introducing as a witness its transfer clerk at that place. Testifying from a memorandum made by himself he swears that he transferred the box, November 23, 1886, and put it in a car of the C., C., C. & I., standing on the track of the O. & M. No one was in charge of the car; there is nothing to show that it ever reached the track of the connecting line. No receipt was taken, nor so far as the proof shows was the C., C., C. & I. ever notified that the box had been transferred to it. While this might be a sufficient delivery to fix liability as between carriers, it is not binding on the shipper. *Hutchinson on Carriers*, Sec. 104. It can not be seriously urged that upon this evidence of delivery to the C., C., C. & I. appellee could have maintained an action against it for a loss or failure to deliver at destination. *Wait's Actions and Defenses*, Vol. 2, pages 22 and 23; 2 *Parsons on Contracts*, 195.

In *C. & N. W. R. R. Co. v. Williams*, 44 Ill. 176, cited by appellant, the transfer clerk of the receiving company swore himself that he received the freight from the company transferring it.

The evidence of delivery in that case is by no means unsatisfactory.

We are satisfied with the judgment of the Circuit Court in

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its view of the case as here presented, and are of the opinion that it should be affirmed.

Judgment affirmed.

THE MOBILE & OHIO RAILROAD COMPANY
V.
THE PEOPLE EX REL. WILLIAM DAVIS.

Railroads—Highway Crossings—Signals—Penalty—Action to Recover—Evidence—Conflict of—Question for Jury—Contributory Negligence.

In an action against a railroad company to recover the penalty for its failure to give the statutory signals at a public highway crossing, it is *held*: That the evidence justified the jury in finding that the crossing in question was a highway crossing and outside of any municipality; that it is immaterial whether the party for whose use the action is brought was guilty of contributory negligence when struck by defendant's locomotive at said crossing, the penalty being forfeited to the State; and that, the evidence being conflicting, the finding of the jury that the required signals were not given, is conclusive.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Monroe County; the Hon. GEORGE W. WALL, Judge, presiding.

This action was brought against appellant to recover the penalty provided for by the statute for its alleged failure to give the statutory signals at a public highway crossing. A trial was had before the court and a jury, a penalty imposed upon a verdict finding appellant guilty, and appeal to this court.

Messrs. POLLARD & WERNER, for appellant.

Appellant was under no obligation whatever to give the statutory signals at the time and place in question. The crossing at which the collision, referred to by the witnesses, occurred was, as alleged in the declaration and shown by the testimony

throughout, in the town of Columbia, being the intersection of the so-called Centerville Road, with appellant's railroad. There is not a syllable of testimony tending to prove that this Centerville road is a public highway. Yet proof of this fact is essential to a recovery under the statute. *C. & A. R. R. Co. v. Adler*, 56 Ill. 344.

But conceding, for the purpose of argument merely, that it is shown that the crossing in question is the intersection of a public road with appellant's railroad, yet, being within the corporate limits of a town, we contend it is not the crossing of the railroad with a public highway, within the meaning of the statute. *Mobile & O. R. R. Co. v. State*, 51 Miss. 137.

Contributory negligence is a defense to an action of this kind. The recovery is allowed only for the use of an aggrieved person. Can a person be said to be aggrieved by a violation of the statute, where his own negligence brings him to grief? We think, on reason and authority, he can not, and therefore, that contributory negligence was a proper defense to this action, and that the trial court erred in refusing the instruction asked for on this subject.

Sec. 62 of the act under consideration prescribes a penalty, no less absolute than the one in question, for the non-observance of its provisions—the fencing of railroad track—and it has been held that contributory negligence will defeat the recovery of the penalty, the value of the cattle killed and attorney's fee. *J. & N. I. R. R. Co. v. Jones*, 20 Ill. 221; *St. L., A. & T. H. R. R. Co. v. Todd*, 36 Ill. 409; *I. C. R. R. Co. v. Middlesworth*, 43 Ill. 64; *R., R. I. & St. L. R. R. Co. v. Irish*, 72 Ill. 404; *T., P. & W. R. R. Co. v. Johnson*, 74 Ill. 83; *T., W. & W. Ry. Co. v. McGinnis*, 71, Ill. 346; *C. & St. L. R. R. Co. v. Woosley*, 85 Ill. 370; *C., B. & Q. R. R. Co. v. Seirer*, 60 Ill. 295.

Mr. WILLIAM WINKELMANN, for appellee.

PILLSBURY, J. It is first objected that there was no proof that the road crossing where the alleged failure to ring the bell or sound the whistle as required by the statute was a public highway, and, therefore, no obligation rested upon the

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appellant to give such signals. We have examined the evidence upon this point carefully with a view to ascertain if such was the fact, and are obliged to disagree with counsel as to the effect of the evidence appearing in the record. The place where the alleged violation of the statute occurred was at the crossing of the Centerville road with the railroad, and the location was shown by a plat made by the surveyor, which purported to be a "plat of the St. Louis and Cairo Railroad crossing at road leading from Columbia to Centerville in Town of Columbia, Monroe County, Illinois." This plat was introduced without objection. The witnesses all call it the "Centerville road," and one describes it as a "macadamized road," and the train men, called by the appellant, testify that they not only on this occasion, but always, gave the statutory signals; and when the engineer was asked why he gave such signals at the Centerville crossing answered: "Road crossing. It is the rule of all railroad companies to compel their engineers to give road crossing signals." This testimony, in the absence of countervailing proof, we deem sufficient to justify the jury in finding that the Centerville crossing was a public highway and that it was so recognized by appellant and its servants engaged in its business of running trains. Indeed, the whole record considered, it does not appear that in the course of the trial below up to the time the instructions were given there was any attempt to raise the question as to the existence of a public highway at that crossing.

It is next said that it appears that this crossing was in the Town of Columbia, and thus a street in a municipality to which the statute does not apply. Without admitting the position of appellant that a street in a town or city is not a public highway within the meaning of the statute requiring signals of the approach of trains to be given, it will suffice to say that there is no evidence in the record that it was within the limits of any such city or town. It is designated in the proofs as the Centerville crossing on the road leading from Columbia to Centerville, called the Centerville road, as distinguished in the evidence from the Waterloo road, another road leading from Columbia to Waterloo and crossing the railroad about 80 or

100 rods from the Centerville road. The evidence introduced was sufficient to justify a finding that it was a public highway outside of any municipality, and, if the appellant desired to properly raise the question whether the statute applied to a street in a town, it could have shown the facts by proving that the crossing in question was on a street in the town and that the town was incorporated.

It is next urged that Davis, for whose use this suit is brought as the aggrieved party, was guilty of contributory negligence in getting struck at this crossing when traveling upon the highway, and that such negligence prevents the people from maintaining this action. This position might avail if Davis was seeking to recover damages from appellant for the injury sustained by him in being run down at the crossing by the train of the appellant. But this action is brought by the State to recover the penalty imposed upon railroads for a failure to comply with the requirements of a general law enacted for the purpose of compelling them to take certain precautions against committing injury to individuals at places where they, as well as the trains of railroad companies, have a perfect right to be. The State has an interest in the preservation of every human life within its jurisdiction, for the units of the population compose the State in the aggregate capacity, and in giving railroad companies the franchise to operate a railway it recognized the fact that it was licensing the use of the most powerful and dangerous machinery to run across our highways at the same grade, and against which the individual citizen passing along such way had no means of protecting himself unless warned of the danger he would assume in being upon the crossing at the time any locomotive was due there. It saw proper, therefore, to provide by general law for a warning to be given of the approach of any locomotive engine to any such crossing, and a penalty for the violation of the duty thus imposed, and where a railroad violates this provision of the statute and incurs the penalty it is no less guilty because some individual citizen was run down when he had not exercised that degree of care required by the common law if he was seeking to recover damages for per-

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sonal injuries. In the one case the people of the State are seeking to recover the penalty affixed by general law for its violation, in the other the individual is seeking to recover for injuries caused by the negligence of another, when by exercising ordinary care he could have prevented the injury occurring. The people in a proper and constitutional manner have declared that in the operation of railroad trains certain precautions are to be observed and signals given in approaching the crossings of public highways, and it is no excuse for a violation of such requirement of the statute that some one was injured in consequence thereof, who, by a greater care to ascertain if a train was approaching, might have escaped being injured. In this case the people sue for the violation of a public statute and they have no concern whether such violation was the proximate cause of the injury to Davis or not. If, after the payment of the penalty to the people by the railroad company they see proper to give it to him, the appellant has no reason to complain. Who is the aggrieved person to whom the court will award the penalty need not concern the appellant. It was its duty to give the signals prescribed by the law of the State. If it did not do so it has forfeited the penalty to the State, and when it has paid it the law is satisfied; it stands discharged and it has no further interest in the application that shall be made of the fund by the court. It is again objected that the verdict is against the weight of the evidence upon the question whether the signals were given for the crossing in question. The engineer and fireman and one other witness for the defendant testify that the signals were made for this particular crossing, while three witnesses for the plaintiff testify equally positively that they were watching the train as it approached the crossing to see if the signals were given, as they saw Davis approaching the crossing and feared that a collision might occur, and each of them swear that the bell was not rung nor the whistle sounded for the Centerville crossing. Five other witnesses for the plaintiff also testify that they were in a position to hear the signals if given, but heard none; some of them state they heard the signal for the Waterloo crossing a greater distance from them than the

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crossing in question, but did not hear any given at this crossing. In such a conflict of the evidence it was for the jury to determine whether the required signals were or were not given, and in that condition of the evidence their finding ought not to be disturbed by an appellate tribunal. The jury were fully instructed by the learned Judge below, and to his charge no exceptions are urged here, and in such case, upon the questions of fact arising upon the record, the verdict of the jury should be taken as settling the facts in the case. No such error appearing as requires us to interfere, the judgment will be affirmed.

Judgment affirmed.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS
V.
ANDREW YUNG, ADMINISTRATOR.

Coal Mines—Sec. 16, Chap. 93, R. S.—Action for Damages for Causing Death of Miner—Parties—Declaration—Negligence at Common Law—Instructions—Arrest of Judgment.

1. In an action by an administrator against a coal mining company to recover damages for causing the death of the plaintiff's intestate, the only omission of duty charged by the declaration being a failure to furnish proofs and prop the clod, dirt, slate and other materials so that it would not fall, it is *held*: That the declaration does not show a violation of Sec. 16, Chap. 93, R. S., under which the owner is only required to furnish and send down such props; that the negligence charged does not constitute a cause of action at common law; that an instruction given for plaintiff, which directed the attention of the jury to other and different elements of liability than those alleged in the declaration, was erroneous; and that the motion in arrest of judgment should have been granted.

2. An instruction which directs attention to elements of liability not specified in the declaration, is fatally defective.

[Opinion filed October 5, 1887.]

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APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Mr. EDWARD L. THOMAS, for appellee.

WILKIN, J. Action on the case, in which it is averred by the declaration that appellant was, on November 27, 1886, operating a coal mine and by its servants mining and hoisting coal therefrom; that while deceased was loading coal in boxes in said mine, without any fault or negligence on his part, a great quantity of clod, dirt, slate and other material fell on him from the roof of the mine, and killed him. "That it was the duty of defendant to furnish props and prop said clod, dirt, slate and other material so that the same would not fall;" that defendant not regarding its duty, as aforesaid, carelessly and negligently, with full knowledge of the dangerous condition of said clod, dirt, etc., and knowing the same was liable to fall and inflict great injury upon said Larcher, or to kill him, neglected and failed to put under said clod, etc., proper supports or props, and by reason of said failure after notice of the dangerous conditions thereof, the said clod, etc, so fell, as aforesaid, and crushed and killed Larcher, as aforesaid, without fault or negligence on his part.

The declaration then avers that the deceased left a widow and minor children, and the grant of letters of administration, laying damages at \$5,000.

A plea of the general issue was filed and, on trial by jury, judgment rendered for plaintiff below for \$3,000, and the defendant appealed to this court.

Appellant treats the case as shown by the declaration, as an attempt to recover for the omission of a statutory duty imposed by the 16th section of the act to protect miners, Chap. 93, R. S., and insists that the declaration does not show any violation thereof, that section only requiring "the owner; agent or operator of coal mines to keep a sufficient supply of timber, when required, to be used as props * * * and to

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send down such props when required;" when, as it is here averred, it was not only the duty of defendant to furnish the props but also to put them in, and prop the roof of the mine so as to make it safe for the workmen.

It is also urged that as a proceeding under the statute the action was improperly brought by the administrator instead of the widow. Both these grounds of reversal presented here were raised below by motion in arrest of judgment. Treating the action as being brought under the statute, there can be no doubt as to the correctness of both propositions; the first being manifested from the mere reading of the statute and declaration, and the second sustained by *Litchfield Coal Co. v. Taylor*, 81 Ill. 500, cited by appellant.

Appellee, however, insists in reply, that the action is at common law, the negligence charged being common law negligence and not statutory; that a good cause of action being alleged at common law, the suit is maintainable by the personal representatives of the deceased under Chap. 70, R. S.

The fallacy of the argument in support of this reply lies in the assumption that the declaration shows common law negligence. The only omission of duty charged by the declaration is the failure to furnish props and prop the clod, dirt, slate and other material so that the same would not fall. The learned counsel cites no authority to show that any such common law duty is imposed upon the owner or operator of a coal mine. Facts and circumstances may exist in a given case from which that duty will be imposed, but no such facts are averred in the plaintiff's declaration. But one instruction was given at the instance of appellee. The first part of it is a copy of the one discussed in *C. & A. R. R. Co. v. May*, 108 Ill. 288, 296, and marked "2." It then adds, "and if the jury believe from the evidence that Fritz Sauer was such servant of the defendant and had the power to hire, discharge, direct and control the deceased, and others working as the deceased was, if they believe from the evidence that deceased was working for defendant, and, while so working, was killed, and that he was under the direction and control of said Sauer, and, while so under the direction and control of said Sauer, was

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killed without fault on his part, then they must find defendant guilty, if they further believe from the evidence that said Sauer knew the dangerous nature of the work at which deceased was put to labor, and, knowing such danger, negligently and carelessly ordered such work to go on, and if they further believe from the evidence that said deceased came to his death by reason of negligence and carelessness on the part of said Sauer in and about the direction and management of said work."

Whatever may be said of the correctness of this instruction as announcing abstract rules of law, it contains a complete departure from the issue in this case. The only negligence charged in the declaration is a failure to furnish props and prop said clod, dirt, slate and other material so that the same would not fall. By the instruction the jury is told that they must find the defendant guilty (the other facts named therein being found from the evidence) if they believe that Sauer knew the dangerous nature of the work at which the deceased was put to labor, and, knowing such danger, negligently and carelessly ordered such work to go on, and then, in still more sweeping terms, if the said deceased came to his death by reason of negligence and carelessness on the part of said Sauer, in and about the direction and management of said work, defendant is to be held liable.

The fault in the instruction is not in declaring that under the facts stated in the first clause the deceased and Sauer would not be fellow-servants, within the rule exempting the common master from liability, but in directing the jury to find the defendant guilty for acts of negligence on the part of Sauer for which it could not be legally held liable under this declaration, if the act had been performed by the defendant itself.

"When the declaration alleges the personal negligence of the defendant as the ground of liability it is a fatal objection to instructions that they direct the attention of the jury to other and different elements of liability." C., C. & I. C. R. R. Co. v. Troesch, 68 Ill. 547.

"An instruction which allows a recovery for negligence in

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general respects without limitation to the particulars of negligence specified in the declaration, is too broad.” C. & A. R. R. Co. v. Mock, 72 Ill. 141; E. & W. G. R. Co. v. People, 93 Ill. 584.

There was manifest error in giving the first instruction and in overruling the motion in arrest of judgment, no good cause of action being alleged in the declaration, and for these reasons the judgment is reversed and the cause remanded.

Reversed and remanded.

FREDERICK C. OBERMARK

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

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Practice—Failure to Assign Errors on Record—Bill of Exceptions—Information—Affidavit.

1. Where no errors are assigned upon the record this court may decline to consider the case.

2. The instructions and a motion for a new trial are no part of the record unless incorporated in the bill of exceptions.

3. An information charging the defendant with unlawfully selling intoxicating liquors requires no affidavit.

[Opinion filed October 5, 1887.]

APPEAL from the County Court of Massac County; the Hon. PLEAS CHAPMAN, Judge, presiding.

Messrs. BENJ. O. JONES and J. C. SHAVER, for appellant.

No brief was filed for appellee.

GREEN, P. J. Frederick C. Obermark was tried upon an information filed in the County Court of Massac County, by the State's Attorney on behalf of the people, charging defendant with unlawfully selling intoxicating liquors in less

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quantity than one gallon without having a license to keep a dram shop. The information is in the proper form, signed by the State's Attorney but not sworn to. The jury found defendant guilty, and the court imposed a fine of \$50 upon defendant and rendered judgment against him for the fine and costs. There are no errors assigned upon the record, and this omission would justify us in declining to examine the case further, or considering the matters complained of by counsel for appellant in their argument.

We will, however, dispose of the case, having examined the record carefully. The instructions complained of by counsel, and the motion for a new trial which they insist was improperly overruled, are no part of the record, and can only be made so by incorporating them in a bill of exceptions, which has not been done in this case. The motion in arrest of judgment (for the reason that the information was not sworn to) was also properly overruled. It was filed by the State's Attorney on behalf of the people and no affidavit was necessary. *Gallagher v. People*, 120 Ill. 180.

We will also add to what has been said that there was sufficient evidence to justify the verdict. The judgment is affirmed.

Judgment affirmed.

THE WIGGINS FERRY COMPANY

V.

GEORGE W. REDDIG.

Marine Tort—Collision on Mississippi River—Jurisdiction—Action at Common Law—Duty of Steamers—Instructions—Entire Charge—Evidence.

1. Neither Illinois nor Missouri can exercise exclusive jurisdiction over any part of the Mississippi River, nor is either confined in the exercise of its own jurisdiction to the middle thereof. The two States exercise concurrent jurisdiction on the river for all judicial purposes.

2. Where a steamer, navigating public waters, does not keep out of the

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way and a collision occurs with a flat-boat, the former is *prima facie* liable in the common law courts as well as in the courts of admiralty.

3. An instruction which defines the legal duty of a steam vessel, in the language of the statute and the decisions, can not be held erroneous, although it may not contain all the law applicable to the case.

4. This court will look at the entire charge to see whether the trial court has laid down the law correctly with proper limitations and explanations of abstract propositions therein contained.

5. In an action to recover damages caused by a collision on the Mississippi River near the Missouri shore, between a steam ferry-boat owned by the defendant and the plaintiff's flat-boat, it is *held*: That the court properly excluded evidence of the common law of Missouri, touching contributory negligence; that, from the instructions given, when taken together, the jury could not have concluded that the defendant was absolutely liable, from the mere fact that the collision occurred; and that the evidence sustains the verdict for the plaintiff.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. H. CANBY, Judge, presiding.

The appellee was the owner of a small flat-boat, and while it was floating down the Mississippi River it was struck by a steam ferry-boat belonging to the appellant, and the appellee, who was engaged in operating his flat-boat, was caught between the two boats and received serious injuries, and he brought this action in case in the St. Clair Circuit Court to recover damages therefor. It appears that the collision occurred near the Missouri side of the river. Contributory negligence of the plaintiff was relied upon as a defense to the action and in this connection the defendant below offered to prove "that by the laws of Missouri, that one who sues for damages to his person can not recover if he himself was guilty of negligence, which materially contributed to the injury complained of," which offered proof was rejected by the court and exception saved. The plaintiff below recovered and the defendant appealed.

Mr. CHARLES W. THOMAS, for appellant.

Sec. 563, Rev. Stat. U. S., gives exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction to the

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United States District Courts, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

This action is for a tort committed on the Mississippi River in the State of Missouri, and is a subject of admiralty jurisdiction. *The Hine v. Trevor*, 4 Wall. 555; *Nelson v. Leland*, 22 How. 48; *The Eagle*, 8 Wall. 15; *The Propeller Commerce*, 1 Black, 574; *Leathers v. Blessing*, 105 U. S. 626.

The appellee, however, chose to take advantage of the saving clause of the statute and invoke the jurisdiction of the State court to apply a common law remedy.

By so doing he abandoned every advantage he might have had in an admiralty court and submitted himself to be governed exclusively by the modes of procedure and rules of practice and evidence which obtained in the jurisdiction he invoked. *Steamboat Co. v. Chase*, 16 Wall. 522.

He accused appellant of doing him an injury in the State of Missouri, and brought his action at common law, and thereby gave appellant the right to apply to the case the common law of that State, regarding the degree of negligence which will bar a recovery there.

The appellant on the trial offered to prove by a competent witness that by the common law of Missouri, one suing to recover damages done to his person can not recover if he himself was guilty of negligence which materially contributed to the injury. The court refused to permit the evidence to go to the jury and exception was taken.

The rights of the parties in a suit for a tort depend upon the law of the place where the wrong was done and not upon the law of the place where the suit is brought. *Story, Conf. Laws*, Sec. 307 d; *Smith v. Coudry*, 1 How. 32; *Mostyn v. Fabrigas*, Cowp. 175; *Shaver v. White*, 6 Munf. 110.

The first instruction given to the jury told them that the law requires a steamboat, under all circumstances, to keep out of the way of a flat-boat. In other words, that no amount of negligence on the part of a person floating along a stream in a flat-boat, would excuse one operating a steamboat in case of a collision. A collision between a steamboat and a flat-boat

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does not necessarily render the steamboat liable. It is proper to weigh the evidence and examine the facts to ascertain who was to blame, as in all other cases. *Fretz v. Bull*, 12 How. 466.

There was no evidence whatever upon which to base a material portion of it. The flat-boat was not floating with the stream when it was struck. The appellee himself testified that it was being propelled by oars, and that his companion was rowing hard. This fact in itself deprived appellee of all the supposed benefit he might have had if he had allowed his boat to float with the current, and made the instruction doubly mischievous. *Pearce v. Page*, 24 How. 228.

Messrs. FRANKLIN A. McCONAUGHY, J. T. KENWORTHY and THOMAS C. FLETCHER, for appellee.

Proceedings of the kind at bar, that is, proceedings *in personam*, against the owner of the vessel for damages for the negligence of those in charge of the vessel, are expressly reserved to the State courts by Sec. 9 of the Federal Judiciary Act of 1789, and the reservation is still more clearly expressed in Sec. 1 of the Act of February 20, 1845. It is accordingly, in general, a matter of election with the injured party, whether he will seek his redress in the State or the Federal courts. *N. J. Navigation v. Mer. Bk.* 6 How. 390.

Where jurisdiction is concurrent, that court which first takes jurisdiction will hold it exclusively—a rule supported by all authority, and founded upon reason, and, we may say, on necessity. *Mason v. Piggott*, 11 Ill. 85; *Smith v. McIver*, 9 Wheat. 532; *Merrill v. Lake*, 16 Ohio, 373; *Ross v. Buchanan*, 13 Ill. 55; *Chittenden v. Rogers*, 42 Ill. 100; *McNab v. Heald*, 41 Ill. 326.

PILLSBURY, J. The defendant below operates a steam ferry for the transportation of railroad cars across the Mississippi River between the City of St. Louis in Missouri and East St. Louis in Illinois. On the morning of the collision the appellee was floating down the river in his boat and passed by the stern of the Sackman, appellant's boat, which was then in her

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slip on the Missouri shore, and when a short distance down the river the Sackman backed out of her slip, running down stream in order to go about for the Illinois shore, and in so doing ran into the boat of appellee and injured him. This action was brought as at common law to recover damages for such injury, averring negligence upon the part of defendant in operating its boat and ordinary care upon his own part. It is insisted that the tort, if any be shown, was committed within the limits of the State of Missouri, and that the rights of the parties are therefore to be governed by the laws of that State, and that for this reason the court erred in refusing the offered proof of the law of that State, concerning the effect of the contributory negligence of the plaintiff upon his right of recovery. Conceding for present purposes that the position of appellant, that a tort is so far local as to require the rights of the parties to be determined by the laws of the State or jurisdiction wherein such wrong was committed, we are of the opinion that such principle has no application to this case.

The Act of Congress of June 4, 1812, concerning the Territory of Missouri, provided that the Mississippi and Missouri Rivers and the navigable waters flowing into them, and the carrying places between the same, shall be common highways, and forever free to the people of said Territory and the citizens of the United States, without any tax, duty or import therefor. Following this is the Act of Congress of April 18, 1818, to enable the people of Illinois to form a Constitution and State government, the second section of which defined the boundaries of the State, and fixing its western boundary as the middle of the Mississippi River, with a proviso "that the said State shall have concurrent jurisdiction * * * on the Mississippi River with any State or States to be formed west thereof so far as said river shall form a common boundary to both." The Enabling Act for the State of Missouri, March 6, 1820, provides (last proviso, Sec. 2): "*And provided also that the said State shall have concurrent jurisdiction on the River Mississippi and every other river bordering on said State and any other State or States, now or hereafter to be formed and founded by the same, such rivers to be common to both,*

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and that the River Mississippi, and the navigable rivers and waters leading into the same, shall be *common highways and forever free*, as well to the inhabitants of the said State as to the other citizens of the United States, without any tax, import or toll therefor, imposed by the said State.” These acts of Congress determine the character of the Mississippi between the State of Illinois upon the east and Missouri on the west to be a common highway over which neither can exercise exclusive jurisdiction, nor is either confined in the exercise of its jurisdiction to the middle of the river, the physical boundary of the State. On the river both States have concurrent jurisdiction for all legal purposes. This jurisdiction thus conferred upon the State is transferred to the several counties bordering upon the river by Sec. 2 of the act relative to counties in the following terms: “Each county bounded by either the Mississippi, Ohio or Wabash River shall have jurisdiction over such river to the extent it is so bounded, which jurisdiction may be exercised concurrently with the contiguous States bounded by such river.” This same jurisdiction is recognized in criminal matters by Sec. 460 of the Criminal Code. From these statutes, both National and State, it is apparent that this great river is treated as a highway belonging to neither State, and yet over which each State exercises joint and equal power and authority for all judicial purposes, and to enable them to redress private wrongs or punish crime, the boundaries of each may be said to extend to the farther shore. Either a private or public wrong being committed upon the waters of the river, this common highway of the people, may then be said to be committed within the jurisdiction of either State, and undoubtedly it would be held that the judicial tribunal first taking cognizance of the cause would, under well established and understood principles, retain its jurisdiction to the end of the controversy, applying the law of the *forum* to the facts of the case in settling the rights of the parties. Upon this ground we see no error in the action of the court in refusing to hear proof of the common law of Missouri. But if we are wrong in this conclusion no possible harm could result to appellant from its rejection, as the law of that State, as offered to be

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proved, is but a fair statement of the existing law of Illinois upon the same subject, and if the court had been requested to so instruct the jury it would have done so.

Objection is taken to the first instruction given for plaintiff as follows:

The court instructs the jury that "under the law applicable to this case, if you believe from the evidence that the boat of the defendant was propelled by steam, and that of the plaintiff was a flat-boat floating with the current of the stream, then, under the law, the boat of plaintiff had a perfect right to proceed along the said current of the said stream and follow the same, and it was the duty of the boat of defendant to keep out of the way of plaintiff's boat." The specific objection urged to this instruction is that it takes from the jury all consideration of the claimed negligence of the plaintiff, and makes the appellant liable if a collision occurs, under any and all circumstances. The purpose of the instruction was to inform the jury of the duty that was cast upon vessels operated by steam in the navigation of public waters, with respect to vessels not having the advantage of this powerful controlling force. Steamers are so little affected in their movements by wind, tides or currents, that they have no great difficulty in selecting and maintaining any course that may suit those in charge of them. Crafts not thus propelled are not in position to control their movements with equal facility, but are so greatly subjected to these natural influences that it has been found necessary to impose upon the more favored craft in these particulars the burden of exercising a higher degree of care and vigilance to avoid collisions than apply to those of an equal grade or class. These duties have not only been defined by the courts of admiralty, but have been declared by the statutes of the United States. Rule 20 of Chap. 5 of the Revised Statutes of the United States, relating to commerce and navigation, provides that "if two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel," and in such case, by Rule 23, the sail vessel has the right to keep her course, hav-

ing a due regard to the perils of navigation or the special circumstances which may exist in the given case, rendering a departure from the rules necessary to avoid immediate danger. Speaking of the effect of these statutory rules Mr. Justice Davis, in the case of *The Steamboat Carroll v. Green*, 8 Wall. 302, which was a case of collision between a steamer and a sailing vessel, said: "The steamer was required to keep out of the way, slack her speed, or, if necessary, stop and reverse, while the schooner was required to maintain her course, and was not justified in changing it unless obliged to do so to avoid a danger that immediately threatened her. As the steamer did not keep out of the way, and as the collision occurred, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner." This decision was re-affirmed in the case of the "*City of Paris*," a steamer, against Simmons, the owner of a sailing vessel injured by a collision with the steamer (9 Wall. 634), where it is said that the schooner was pursuing her regular course when she reached the steamer's track, and this she had the right to do, and the duty rested upon the steamer to see her and keep out of her way. These authorities are clear as to the duty imposed upon steam vessels in navigating public waters, and are no less imperative when the remedy is sought in the common law courts than in the courts of admiralty. The duty is defined by the general law and a violation of this duty is negligence, and if a collision occurs in consequence of such violation liability ensues, unless the party guilty of such act can show such contributory negligence on the part of the plaintiff as to prevent a recovery. An instruction, therefore, that defines the legal duty of a steam vessel, in the language of the statute and of the decisions, can not be held erroneous although it may not contain all the law applicable to the case in hand. *Race v. Aldridge*, 90 Ill. 250.

This is as far as the instruction in question went and did not prevent, as is supposed, the defendant from presenting its requests to the court to have the jury properly advised as to the effect of the alleged negligence of the plaintiff.

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The court did indeed give the only instruction asked by the defendant, which must have been considered by the jury in connection with that of the plaintiff, of which complaint is made. That instruction was as follows: "The court instructs the jury that unless the evidence all taken together shows that the servants of defendant were guilty of some particular act or acts of negligence which caused plaintiff's injury, plaintiff can not recover." The jury could not, from these two instructions, have concluded that the defendant was absolutely liable from the mere fact that a collision occurred, but in addition to such fact they must find that "the defendant was guilty of some particular act or acts of negligence which caused plaintiff's injury." As we have seen, the instruction given at the request of the plaintiff correctly defined the duty of the defendant, and that of the defendant required the commission of some specific act in violation of that duty before the liability of the defendant attached for the injury occasioned by the admitted collision between the boats. Thus construed we are of the opinion the law was given to the jury with substantial accuracy so far as responsibility attached to the defendant for the injury, and if the defendant had seen proper to submit to the jury the question whether the plaintiff could have avoided the collision, it could have prepared proper requests for that purpose.

Under our system of instructing juries it can scarcely be expected that every written one shall present all the law of the case. The jury are to be advised as to the law applicable to various branches of the case as well as to the matters involved as a whole, and when the law is correctly given upon any single point or question arising in the case and does not ignore other principles applicable to other branches of the case, but these are also properly stated in other parts of the general charge, such instruction ought not to be held erroneous. *McCollom v. I. & St. L. R. R.*, 94 Ill. 534; *Town of Fox v. Town of Kendall*, 97 Ill. 72. Such is believed to be the rule in those jurisdictions where the jury is charged orally by the court in one general connected charge and where one part of the charge is held to be modified, limited or explained by

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other parts of the same charge. The true rule would seem to be that the entire charge is to be looked at by the appellate tribunal, whether the charge is given orally or in writing, and if it, as a whole, has laid down the law correctly with proper limitations and explanations as to abstract propositions contained in it, it is and ought to be sufficient. Such is the holding of our own courts. *Northern L. Packet Co. v. Binniger*, 70 Ill. 571. The merits of the case are clearly with the plaintiff. He was floating down the stream in his boat and he had a perfect right to be there. He had passed the dock of the *Sackman* quite a distance when she backed out with her stern down stream and after getting into the river and down stream a sufficient distance, turned her stern toward the western shore in order to obtain sufficient room to head for the Illinois shore and in so doing backed into the plaintiff's boat.

The only excuse offered is that the wheel-houses of the steamer were so high as to cut off the view of the pilot in the wheel-house from the river either to the right or left of the stern; that it was only between the wheel-houses directly astern that the river could be seen in near proximity to the boat, and in consequence of this obstruction of the view the pilot did not notice the boat of the plaintiff until the stern of the steamer had so far swung around as to bring it in view between the wheel-houses over the deck of the ferry, when it was too late to avoid the collision. If the view of the waters of the river was thus obstructed, common prudence would suggest that a lookout should have been stationed upon the stern of the ferry-boat so as to give warning of the presence of any craft upon the river liable to be injured while the ferry was backing out of her slip. Her duty was to see that the way was clear and not back out into the river where boats were likely to be passing at any time without taking any precaution to avoid meeting with them. When the plaintiff saw that his boat was in immediate danger of being run down he used his best endeavors to row his boat into the shore and thus avoid the injury, and in this it is claimed his negligence consisted. We do not so regard his action, but consider it but a fair effort upon his part to avoid the effect of the negligence

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of those in charge of the ferry-boat. We have not noticed especially the instructions concerning the measure of damages, as it was conceded upon the oral argument of the case that if the plaintiff was entitled to recover upon this record, no valid objection could be taken to the amount of damages assessed by the jury. The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

THOMAS M. DUNNING

V.

JOHN BIRD.

Dogs—Action for Damages for Killing—Justification.

In an action to recover damages for killing a dog, it is *held*: That the killing was justifiable, the dog having been found late at night destroying the defendant's property on his premises; and that as the dog was a trespasser, the owner can not complain that the plaintiff's building was insecure.

[Opinion filed October 5, 1887.]

APPEAL from the County Court of Pope County; the Hon. GEORGE A. CROW, Judge, presiding.

Messrs. ROSE & SLOAN, for appellant.

Messrs. W. S. MORRIS & SON, for appellee.

WILKIN, J. This was an action of trespass for killing a dog. The pleas are not guilty, justification in defense of property and in defense of person. A trial before a jury in the County Court resulted in a verdict and judgment for the plaintiff below for \$20 and costs, and defendant appeals.

The dog killed was one of a pack of eleven fox hounds, this one and three others belonging to appellee and the others to a

neighbor. The dogs passed to and from the respective places of their owners, staying sometimes at one place and sometimes at the other. There is no controversy as to the fact that different ones of the pack had from time to time trespassed on the premises of appellee, this one with others having been driven out of his smoke-house. The only evidence found in the bill of exceptions as to the circumstances under which the killing took place, is the uncontradicted testimony of appellant. He says his wife woke him up about eleven or twelve o'clock at night; said dogs were in the smoke-house again. "I got up, took my gun, as dogs had been there before and one had jumped at me. As I went out I saw a man run away from back of house. I went back, got pistol and told wife to rattle on door of smoke-house. I went to back of smoke-house and found where dog had made hole into smoke-house. Wife rattled on door and dog came out and as he came out of hole turned toward me and growled and I shot at him—think I hit him. He still came on and I shot again—think I missed him. He kept on coming and I shot again with revolver and he fell dead." He then states that he found pieces of bacon in the smoke-house partly eaten by dogs. The only other evidence tending to prove the killing, corroborates him as to the fact that the dog was shot on his premises, and that several shots were heard at the time. There is absolutely nothing in the record to contradict or impeach this statement, unless it be found in the unnaturalness of his conduct in not shooting the dog as he came out, and before he turned to attack him.

We have been unable from a careful inspection of the evidence to find any justification for discrediting the statements of appellant and giving credit thereto; we unhesitatingly hold that the killing was justifiable. A great deal of legal learning has been devoted to, and able opinions written on the law relating to the defense of person and property against the attacks of dogs and other animals of that class.

Most of the cases bearing on the subject may be found collated in *Aldrich v. Wright*, 53 N. H. 398, found in the *American Reports*, Vol. 16, page 339. See also the case of *Anderson v. Smith*, 7 Ill. App. 354.

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It is unnecessary to enter into a discussion of that subject here. There is no authority holding a person liable for killing a dog under circumstances like those detailed by appellant, and if there was, it would be without binding force upon either individuals or courts, because of its unreasonableness. We do not ignore the right of property in dogs. We do not hold that they may be killed with impunity, nor for trivial causes. We are prepared to cheerfully follow the decisions of our Supreme Court in *Brent v. Kimball*, 60 Ill. 211, and *Spray v. Ammerman*, 66 Ill. 309; but they have no bearing upon this case. Here the dog was away from his master and the places at which it belonged, late at night, trespassing on appellant's premises and destroying his property.

That appellant was bound to only use such force as was necessary to drive him away, taking chances on his immediate return, when he had again retired, and look to an unknown owner for compensation for damages sustained, can not be the law, and we hold that when he found him coming out of his building, where he had property which he knew the animal would, by instinct, destroy, it being at a late hour of night, having no means of knowing his owner, and knowing the disposition of such an animal under such circumstances to return to the place where he was found, he had a right to shoot him, in the reasonable necessary defense of his property. It is no answer to say that it was the duty of appellant to so construct his building that the dog could not get in it. The dog was a trespasser and it does not lie in the mouth of his owner to say that the building was insecure. There is no evidence tending to show that the animal was tempted to come upon appellant's premises by his misconduct.

But on the plea of defense of person, under the evidence, the verdict should have been for the defendant below. Suppose the dog had been a person committing burglary and when surprised, instead of fleeing, turned upon the one discovering his crime, and when fired upon, continued to advance, manifesting a disposition to do violence, would not the one thus threatened be justified by the law in shooting him? Shall it be said that a stricter rule obtains where the life of a dog is taken?

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However much pleasure or even profit there may be in the ownership of dogs, no one has a right to enjoy that pleasure or profit and so far disregard the rights of others as to permit them to go unrestrained and unattended at all hours of the day and night, preying upon the property of others. We think the verdict of the jury is so manifestly against the evidence as that it was an error in the court below not to set it aside and grant a new trial, and for that reason the judgment is reversed.

Judgment reversed.

ANDREW NEATHERLY

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Jurisdiction—Appeal from Justice to County Court in Criminal Cases—Statutes—Repeal—Assault and Battery.

1. Under the Act of May 21, 1877. the County Court has concurrent jurisdiction with the Circuit Court of appeals from Justices of the Peace in cases arising under the Criminal Code.

2. Where two acts can stand together, the doctrine of repeal by implication has no application.

[Opinion filed October 5, 1887.]

APPEAL from the County Court of Fayette County; the Hon. JAMES I. STILLMAN, Judge, presiding.

Complaint being made before a Justice of the Peace, charging Neatherly with the offense of assault and battery, he was arrested and upon trial was fined by the Justice \$10 and costs, from which fine he appealed to the County Court.

That court upon motion dismissed his appeal upon the ground alone that the said appeal should have been taken to the Circuit Court and that the County Court had no jurisdiction in such appeals, and from that order the case is brought

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by Neatherly to this court, where the only question submitted is, was the appeal properly taken to the County Court.

MESSRS. CRATTY BROS. & ASHCRAFT, for appellant.

MR. J. M. ALBERT, for appellee.

PILLSBURY, J. Section 9 of Division 9 of the Criminal Code, R. S. of 1874, provides that "the defendant may appeal from the judgment of the Justice of the Peace in criminal cases to the Circuit Court of the county, the appeal to be taken in the same time and manner, and upon the same conditions and with like effect, and like proceedings may be had thereon, as in civil cases, except that no damages shall be allowed, and except that in the County of Cook the appeal shall be to the Criminal Court of Cook County."

It is not denied that the prosecution at bar falls within the definition of criminal cases within the meaning of said section, and it is insisted by the people that the remedy therein provided is exclusive, as that section is still in full force and unrepealed.

March 26, 1874, an act was approved to extend the jurisdiction of the County Courts, the seventh section of which declared that "the County Courts shall have concurrent jurisdiction with the Circuit Courts in all that class of cases wherein Justices of the Peace now have or may hereafter have jurisdiction, where the amount claimed or the value of property in controversy shall not exceed \$500, and in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary or death, all of which shall be cognizable at the law terms hereinafter mentioned. *Provided*, no appeal shall be allowed from Justices of the Peace to the County Courts." R. S. 1874, p. 339.

This was the state of the law until May 21, 1877, when the Legislature, by act on that day approved, enacted that section seven of the act of 1874 should be amended so as to read as follows: "Section 7. The County Courts shall have concurrent jurisdiction with the Circuit Court in all that class of

cases wherein Justices of the Peace now have or may hereafter have jurisdiction, where the amount claimed or the value of property in controversy shall not exceed \$1,000, concurrent jurisdiction in all cases of appeal from Justices of the Peace and Police Magistrate (provided, appeals from the County Judge when sitting as Justice of the Peace, shall be taken to the Circuit Court as now), and in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary or death, all of which shall be cognizable at the law terms hereinafter mentioned." Sess. Laws, 1877, p. 77.

It is seen from this act, concurrent jurisdiction with Circuit Courts was conferred upon County Courts in all cases of appeals from Justices of the Peace and Police Magistrates, with the exception that when the County Judge tries a cause sitting as a Justice the appeal from his judgment must be taken to the Circuit Court. This exception would include cases arising under the Criminal Code, Division 5, R. S. 1874, p. 398, and tried before such Judge as a conservator of the peace.

It is evident that in the view entertained by the Legislature, such exception was necessary to exclude appeals provided for in the Criminal Code from the County Judge when so acting, from the operation of the general terms of the act conferring such concurrent jurisdiction upon the County Court.

It was a complete change in the jurisdiction of those courts, respecting appeals, from that prescribed in the statute of 1874 above cited. In *that* no appeal was allowed to the County Court; in the *latter* concurrent jurisdiction with Circuit Courts was given.

It is not denied that the language of this act is broad enough in its ordinary signification to include the appeal in question in this case, but it is insisted that the words "in all cases of appeals from Justices of the Peace and Police Magistrates," are to be limited to appeals in civil causes, and not as applying to any appeals that are allowed to be taken to the Circuit Court by virtue of the section of the Criminal Code above noticed; and *Ward v. People*, 13 Ill. 635, *Ham v. People*, 15 Ill. 302, and other cases, are referred to as sustaining such view.

As we understand those cases the court was giving a con-

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struction to that section of the statute relating to the jurisdiction of, and practice before Justices of the Peace in civil causes, and regulating the taking of appeals from their judgments, and held that the provision contained in that act, providing that "appeals from Justices of the Peace to the Circuit Court shall be granted in all cases except upon judgments confessed," only applied to civil cases tried before the Justice and was not intended to include criminal cases.

It being evident from the entire act that it was the intention of the Legislature in its enactment to simply provide for and regulate the practice before Justices of the Peace in civil matters, and that the act, as a whole, had no reference to criminal matters or procedure that might, under other acts, come before a Justice of the Peace, the court very properly limited the meaning of the word "all" in the section allowing appeals to the class of actions or proceedings provided for in the act as a whole. But the Act of 1877, extending the jurisdiction of County Courts, is not to be thus limited. There is nothing in the avowed object and purpose of the act, or in the title or context, that limits the ordinary and natural significance of the words used. If it be said that the act has for its object the conferring and prescribing the jurisdiction of the County Courts, and regulating the practice thereof in civil matters, it may be answered that the act relates to criminal matters as well as civil. Giving the County Court concurrent jurisdiction with the Circuit Court in all appeals from Justices of the Peace, does not, as is suggested, repeal that provision of the Criminal Code allowing like appeals to the Circuit Court. Both acts can well stand together, and in such case the doctrine of repeal by implication has no application. In our view the County Court erred in holding it had no jurisdiction, and its judgment dismissing the appeal will be reversed and the cause remanded, with directions to hear and determine the case upon the merits, notwithstanding its former action.

Judgment reversed.

Grannemann v. Kloepper.

LOUIS GRANNEMANN
V.
FERDINAND KLOEPPER.

Master and Servant—Action for Wages—Abandonment of Contract—Settlement—Excessive Judgment—Entry of Correct Judgment—Costs.

In an action for wages, it is *held*: That the evidence shows that the contract was abandoned by mutual consent, and that there was a settlement between the parties; that the counter-claim of defendant was properly excluded; that there can be no recovery for the full term; that the judgment of the County Court was excessive; and that judgment may be entered in this court for the amount found due by the Justice, with costs before him and the County Court, appellant being allowed costs in this court.

[Opinion filed October 5, 1887.]

APPEAL from the County Court of Randolph County; the Hon. WARREN N. WILSON, Judge, presiding.

MESSRS. WILLIAM HARTZELL and J. B. SIMPSON, for appellant.

Mr. RALPH E. SPRIGG, for appellee.

WILKIN, J. Appellee sued appellant for wages and, before a Justice of the Peace, obtained judgment for \$68.50. Appellant appealed to the County Court and there the judgment was increased to \$130, and he again appeals to this court.

It appears from the evidence that appellee began to work for appellant on the 12th day of April, 1886, under a contract to work for nine and one-half months for \$140, and quit September 18, 1886. At the time he quit there was a quarrel between the parties.

The judgment before the Justice was for the time actually engaged, less \$10 paid by appellant's wife. The judgment before the County Court was for the full contract price for the term of nine and one-half months, \$140, less the \$10 paid.

The evidence clearly shows that the contract was abandoned by mutual consent, and we think it sufficiently appears that there was at the time a settlement between the parties and the

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amount due found to be \$68.50. Appellee testified: "I then asked him if he wanted me to work for him any longer; asked for settlement but he did not pay me; he followed me to the barn lot. We then talked about a settlement; he figured up what he owed me and made a mistake of \$5. I then figured it up, but don't remember how much it was."

Appellant says in his evidence: "He then asked me for a settlement and I then began to figure up how much I owed him and when I got through he looked at it and said that I had made a mistake of \$5, which I had. He then figured it up making it \$78.50, less \$10, making me owe him at settlement \$68.50."

It is clear, under this state of facts there could be no recovery for the full term at the contract price. The authorities cited by counsel for appellee in support of the judgment of the County Court are inapplicable, for the reason that the evidence fails to show a wrongful discharge by appellant or an abandonment by appellee on account of the mistreatment of appellant. On the contrary he was willing to quit and called for a settlement. Appellant was willing that he should quit and they at least made an effort to settle for the work performed. No claim was then made for pay for the unexpired term. In fact the suit was begun before the Justice of the Peace before the expiration of the term.

Whether there was a final agreement between the parties as to the amount due or not, the judgment of the County Court can not be sustained. But we hold that there is sufficient evidence of a settlement to preclude the parties from bringing forward demands not then claimed, and insisting upon them, either under the contract of hiring, or by way of set-off, and for that, if no other reason, the counter-claim of appellant was properly excluded.

The judgment of the Justice of the Peace was clearly right, and a judgment will be entered in this court for the appellee against appellant for the sum of \$68.50 and execution awarded therefor, and also for costs before the Justice of the Peace and in the County Court. The judgment of the County Court will be reversed and appellant allowed costs in this court.

Reversed.

EAST ST. LOUIS CONNECTING RAILWAY COMPANY
V.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

Carriers of Cars—Extent of Liability—Delivery to Consignee—Loss—Declaration—Sufficiency of—Evidence, Prima Facie, of Existence of Consolidated Corporation.

1. Everything is negligence in a carrier that the law does not excuse. A general allegation of negligence is, therefore, sufficient to sustain a recovery.

2. A copy of the articles of consolidation between two or more corporations duly certified under the seal of the Secretary of State, is *prima facie* evidence of the existence of the consolidated corporation.

3. Where a common carrier of cars receives loaded cars to be delivered to the consignee and returned when unloaded, its liability as a common carrier continues until their safe return.

[Opinion filed October 5, 1887.]

APPEAL from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

The declaration alleges that the cars were delivered to appellant to be conveyed by it, as a common carrier, to the Glucose Works, "and after the said cars should be unloaded" to be safely returned by it to appellee, and that appellant undertook and promised to safely convey the cars over its road to said Glucose Works, "and after the same should be unloaded," to safely return them to appellee.

The declaration fails to show in what manner the appellant carelessly and negligently conducted itself with respect to the cars. It makes no definite charge of any particular neglect or default of appellant which in any manner contributed to the loss of appellee's property. A general charge in an action on the case for negligence, that the defendant, intending to injure plaintiff, so carelessly and negligently conducted himself with regard to plaintiff's property that it was wholly lost to plaintiff.

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iff, would scarcely be considered good pleading under the decisions of our courts. C., B. & Q. R. R. Co. v. Harwood, 90 Ill. 425; McGanahan v. E. St. L. & C. R'y Co., 72 Ill. 557.

In the case at bar the defendant can only be held liable for doing just what plaintiff told it to do. In the case in 109 Ill. the defendant was held liable because, instead of returning the cars after the consignee re-delivered them to it for that purpose, it used them without plaintiff's knowledge, and lost them while so using them. It was because the defendant assumed the responsibility of using the cars instead of returning them that it was held liable.

Nor is the position tenable that appellant can, under the circumstances, be held as an insurer. This liability only attaches while the carrier has charge and custody of the consigned goods in its capacity of common carrier. There is no such liability where the goods have reached their destination and are stored by the carrier for the consignee, although they may still be in the custody of the carrier.

In the case of Missouri Pacific R. R. Co. v. Chicago, etc., R. R., 23 Am. & Eng. R. R. Cases, 718, it was held that where a railroad company receives loaded cars from another road for transportation it is liable as a common carrier in case they are destroyed *en route* by fire. If destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault.

Mr. G. B. BURNETT, for appellee.

The charge is that through appellant's fault the cars were destroyed, and it is immaterial, so far as the liability of appellant is concerned, whether they were destroyed before or after they were unloaded; being destroyed, appellant could not perform its contract to return them; and being destroyed through its fault, it is liable, whether the cars were loaded or unloaded at the time of their destruction. This is the theory of the declaration, and it rests upon familiar principles.

The proof shows that appellant's business was to take loaded cars from the different roads, convey them to the place where they were to be unloaded, and, when unloaded, to return the

empty cars to the road from which it received them. It is also shown that such was the usage and custom between appellant and appellee, and between appellant and the other roads terminating at East St. Louis. This being so, under the rule announced in *P. & P. U. R'y Co. v. C., R. I. & P. R'y Co.*, 109 Ill. 135, appellant was a common carrier of the two cars in question, and could only excuse itself for the non-return of them by showing that it was prevented by the act of God or the public enemy.

WILKIN, J. Action on the case, the declaration averring that defendant below was a common carrier by its railroad from and to the termini of certain other railroads in East St. Louis. That plaintiff, on December 16, 1883, at its special instance and request, caused to be delivered to the defendant as such carrier two flat cars loaded with coal of the value of \$300 each, to be taken care of and safely carried by defendant as such carrier to the East St. Louis Glucose Works in said city, and after the said cars should be unloaded to safely return the same to the plaintiff, and in consideration thereof and of a certain reward to the defendant in that behalf to be paid, the defendant undertook and promised plaintiff to take care of said cars and safely and securely convey the same over its said railroad to said Glucose Works, and after the same should be unloaded to safely return and deliver the same to the plaintiff. It is then averred that it did not take care of said cars or safely and securely convey the same to and from said Glucose Works nor safely and securely deliver the same to the plaintiff, but on the contrary, so carelessly and negligently behaved and conducted itself with respect to said cars that they were wholly lost to plaintiff, to its damage \$600. The case was tried before the court without a jury, on a plea of the general issue and *nul tiel corporation*, the issues found for the plaintiff below, and judgment was rendered in its favor for \$600, and the defendant appealed.

There was a motion below in arrest of judgment on the ground that the declaration was so fatally defective as to be insufficient to support a judgment. The first ground of objec-

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tion to the declaration is that it is shown by its averments that the cars were only to be returned to plaintiff after they were unloaded, and that there is no allegation that they were unloaded, and therefore no breach of duty is shown. This objection goes to the merits of the case and will be considered hereafter.

A second objection is that it fails to show in what manner the defendant carelessly and negligently conducted itself with respect to the cars, and makes no definite charge of any particular neglect of duty or default, contributing to the loss of the property. The action being against appellant as a common carrier, *assumpsit* or *case* could be adopted by the pleader as best suited his purposes. Hutchinson on Carriers, Sec. 740.

Everything being negligence in a carrier that the law does not excuse, it is unnecessary to allege the particular character or degree of negligence upon which the plaintiff relies for his recovery, but the allegation of negligence generally is sufficient. *Ib.*, Sec. 34,

It is again urged that on the issue made by the plea of *null tiel corporation*, the proof failed to show the legal existence of appellee.

On the trial plaintiff introduced in evidence a copy of "The articles of consolidation between the Wabash Railway Company and the St. Louis, Kansas City and Northern Railway Company, forming the Wabash, St. Louis & Pacific Railway Company," which is duly certified under the seal of the Secretary of State.

This, by Sec. 40, Chap. 14, R. S., is made *prima facie* evidence of the existence of the consolidated corporation. It was not, therefore, necessary to prove the legal existence of the companies entering into the articles of consolidation by evidence other than that of the certificate of the Secretary of State to the articles of consolidation. *Prima facie* proof of the corporate existence of the Wabash, St. Louis & Pacific Railway Company was made, and there being no proof to the contrary, that issue was properly found for the appellee.

The remaining question involved in the record is one going to the merits of the case, and forms the principal contention

between the parties, namely, on the facts, can the appellant be held liable as a common carrier. This contention is not one of fact but of law.

Parties do not differ as to these substantial facts. Appellant was a common carrier of loaded cars between the termini of the several railroads coming into East St. Louis, and such elevators, mills and factories as were connected by rail with appellant's track. The East St. Louis Glucose Works were connected with its track in such manner that all consignments of loaded cars made to it were delivered by appellant upon a switch running north and south, from which they were placed on a turn-table, where it received them from the turn-table and ran them into its own yards, and after they were unloaded returned them to the same turn-table, from which they were taken by appellant and re-delivered to the company from which they had been received.

On the 16th of December, 1883, appellee delivered two cars loaded with coal to appellant to deliver to these Glucose Works, the cars belonging to appellee, the coal to a consignee for whom appellee had transported it to East St. Louis. Appellant delivered them in the usual way to the Glucose Works and it took them, as was customary, and placed them on its switch in its yard. That night, before the cars were unloaded, standing on said switch, they were destroyed by fire. Under this state of the case appellant insists that, it appearing that the cars were only to be returned after they were unloaded, and being at the time of destruction in the possession of the Glucose Works by consent of appellant and not re-delivered, nor even in a condition to be re-delivered to it, by reason of still being unloaded, it can not be held liable. Appellee on the contrary, relying upon the authority of *P. & P. U. R'y Co. v. C. R. I. & P. R'y Co.*, 109 Ill. 135, maintains that upon the delivery of the cars by it to appellant the latter became liable as a common carrier, not only while transporting them to the Glucose Works but also for their safe return; that such liability continued until so returned, notwithstanding the agreement of the parties that they were to be delivered to a third party to unload and only then to be returned. Unless something shall be

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found in this record to distinguish the case in principle from the one above cited, it must control our decision. It is certainly clearly decided in that case that a railroad company like that of appellee engaged in a like business, receiving from other railroads, cars loaded with freight to be transferred by it to a place directed by such other company, there to be unloaded, and afterward returned, is, as to such car, a common carrier, and in that capacity liable to the owner.

In that case the transfer company took a car belonging to the C., R. I. & P. R'y Co., loaded with freight, to the Monarch Mills or distillery to be there unloaded.

After the freight was discharged at the distillery the transfer company again took it and left it at the Peoria Sugar Refinery, on an order from it, to be there re-loaded, then switched to the transfer track for shipment by the owner of the car. While at the refinery it was burned, and the transfer company held liable for its value to the owners as a common carrier. It is insisted by appellant that the case is clearly distinguishable from this in the fact that there the car was taken to the Sugar Refinery without the consent of the owner. It is true no such express consent was given, and it would seem from one expression used by the learned Judge who delivered the opinion that some stress was laid upon that fact, yet it is clear when the whole opinion is considered that the liability is placed upon the ground that the defendant, by its undertaking to take and return, became a common carrier as to the car. In other words, that decision holds the defendant liable, not as a wrongdoer in taking the car to an unauthorized place, or for negligently performing its duty in relation to the car, but because its undertaking to return it was such that nothing but the act of God or the public enemy could avail it as an excuse. It is ably argued by counsel for appellant that it is unreasonable to hold a party liable for the loss or destruction of property in no way under his control or management, but in the possession of another by consent of the owner. If, however, he contracts with the owner, or assumes the liability of an insurer, knowing that for a time the property will be in the possession and under the control of a third party,

he can not complain. Many cases of seeming hardship upon common carriers may be suggested. The hardship, however, must, and does usually result from the parties contracting either in ignorance of, or without reference to their strict liability. Whether it is wiser to hold a transfer company under the state of facts here presented as a common carrier than as mere bailees, is a question with which we are neither at liberty, nor disposed to deal, the Supreme Court having settled that express question in the case referred to.

Nor is there any substantial ground for the position that the facts of this case should withdraw it from the binding force of that in any view of the law.

As before stated, it is true that there the car was taken to the Sugar Refinery without the express consent of its owner and there burned, but it does appear from the facts stated by Judge Scott in his opinion, that there was a common understanding among the companies at that place that if other shippers desired cars, defendant (*viz.*, the transfer company), without specific orders, was at liberty to place them at their place of business to be loaded and when loaded to be returned to the owner to be shipped, and he adds that "at all events it appears cars were so handled and the companies concerned seem to have acquiesced in that mode of doing business." Therefore, by the custom and mode of doing business the car mentioned in the principal case was at the refinery by the consent of the owner as much as the two here sued for were at the Glucose Works by consent of their owner, Parson on Contracts, Vol. 2, Sec. 9, p. 535.

Enough has been said to indicate the view that appellant's liability does not depend upon the unloading of the cars and their re-delivery to it by the Glucose Works, and therefore the declaration is not subject to the first objection made to it.

Considering the whole case in the light of P. & P. U. R'y Co. v. C., R. I. & P. R'y Co., *supra*, we are satisfied with the judgment of the City Court and affirm it.

Judgment affirmed.

Gardiner v. Mays.

W. H. GARDINER
V.
LEVI G. MAYS.

Malicious Prosecution—Want of Probable Cause—Burden of Proof—Evidence—Malice—Advice of Counsel.

1. In an action for malicious prosecution the burden of proof to show want of probable cause is on the plaintiff, and he must make such proof clear and satisfactory.

2. To determine whether there is probable cause for instituting a criminal prosecution, the prosecutor is not required to verify each item of information. It is sufficient if he acts with reasonable prudence and caution.

3. Malice may be inferred from want of probable cause, but such an inference is not always warranted.

4. In the case presented, it is *held*: That the evidence fails to show want of probable cause; that the question of probable cause is not one of actual guilt, but of honest and reasonable belief of the party prosecuting; and that the evidence did not warrant the jury in finding malice.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Jefferson County; the Hon. C. C. BOGGS, Judge, presiding.

Mr. C. H. BURTON, for appellant.

Messrs. POLLOCK & POLLOCK, for appellee.

The question of probable cause and malice are questions for the jury, under the evidence. A party causing the arrest should use reasonable efforts to learn and know the true character of the person, and if he does not, this may be considered on the trial. *Hirsch v. Feeney*, 83 Ill. 548.

Where a party communicates to counsel all the facts bearing upon the guilt of the accused of which he has knowledge, or could have ascertained by reasonable diligence, and in good faith acts upon the advice of counsel, he can not be held responsible; but it is a question for the jury. *Anderson v. Friend*, 71 Ill. 475.

If a party either culpably or negligently withhold from counsel any material fact the advice will not protect him. *Brown v. Smith*, 83 Ill. 291.

The party must show that in perfect good faith he attained the advice of counsel upon a full and accurate statement of all the facts. *Davie v. Wisher*, 72 Ill. 262; *Ames v. Snider*, 69 Ill. 376.

Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the person accused is guilty of the offense charged. *Splane v. Byrne*, 9 Ill. App. 392; *Harpham v. Whitney*, 77 Ill. 32.

If a criminal prosecution is shown to be without probable cause the jury may infer malice. *Splane v. Byrne*, 9 Ill. App. 392; *Krug v. Ward*, 77 Ill. 603; *Mitchinson v. Cross*, 58 Ill. 366; *Thompson v. Force*, 65 Ill. 370; *Montross v. Bradsby*, 68 Ill. 185.

Among the circumstances tending to show want of probable cause the good character of the accused stands out prominently. *Ross v. Innis*, 35 Ill. 487.

In cases of torts verdicts are to stand unless grossly erroneous. *City of Ottawa v. Sweely*, 65 Ill. 434.

In actions *ex delicto* it is seldom that courts will interfere with the finding of the juries. *Fish v. Roseberry*, 22 Ill. 288.

If the evidence tends to support the verdict it will not be disturbed. *C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454.

A new trial will not be granted because it is contrary to the evidence, unless it is so strongly against the evidence as to be unsupported by it. *Harbison v. Shook*, 41 Ill. 141; *First National Bank v. Mansfield*, 48 Ill. 494.

WILKIN, J. This is an action on the case for malicious prosecution. By the declaration, appellant is charged with prosecuting appellee for an assault on one Joshua D. Gardiner without any reasonable or probable cause therefor; plea of not guilty, and trial by jury, verdict and judgment for plaintiff below for \$50, and defendant appeals. It appears from the evidence that on the 17th of October, 1885, Joshua D.

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Gardiner, the father of appellee, at his home in the Village of Jefferson City, about 9 o'clock in the evening, was assaulted and knocked to the ground by a blow on the head and robbed. Appellant and his wife found him soon after unconscious and seriously injured. He was unconscious of the presence of his assailant until struck, and therefore unable to give any information as to who struck him. Appellee was about moving his family to Union County. He had been living some five miles from Gardiner. The evening of the assault, he was seen about a half mile from the place of the assault and at different places in the neighborhood made inquiries, which, he says, were made for the purpose of enabling him to find the place of one Marion Hill, where he expected to remain during the night. He did go to Hill's house, and stayed there from about 9 o'clock until the next morning, when he left, going to Union County, where he joined his family and remained until he was arrested and brought back to Jefferson County for trial. On his preliminary trial he was represented by counsel, and the people were also represented by the County Attorney. Being bound over, and failing to give bond, he was committed to the county jail. At the next term of the Jefferson Circuit Court he was indicted for the offense charged and, on a trial, acquitted. On this trial appellee introduced as a witness on his behalf, one James R. Driver, who was originally joined with appellant as a defendant, and against whom the suit had been dismissed. His evidence is very unsatisfactory but he swears (and having introduced him, appellee must accept his statement as true) that appellant had previously seen Mrs. Marion Hill and that she had given him some facts, but he believed had not told him all she knew. The witness says he then went to see her and reported to appellant that she informed him that appellee came to her house the night of the assault, excited, muddy and tired, and said he had a hell of a racket with Henry Reads; that afterward he showed his money and wanted her to run off with him and said he had knocked old man Gardiner in the head, or had done old man Gardiner up. He also says she told him that appellant had offered her \$25, but just what the conditions of the

offer were does not appear. This same witness swears that upon his reporting to appellant his information from Mrs. Hill he stated that Frank Camron had stated that appellee told him the night of the assault that "he intended to raise hell in Jefferson City or with old man Gardiner," or something to that effect. The father of appellant swears that Camron did so state to him, and that he gave the information to his son, the appellant. Their information was all obtained before the warrant was sworn out by appellant. It is insisted by appellee that appellant had no right to rely upon the information from Mrs. Hill, because it appears that he, by offering her \$25, had induced her to make the statements, nor upon the alleged information as to what Camron had said, because Camron shows by his evidence that he never made such statements. We find nothing in the evidence to show that appellant, by offer of money or otherwise, induced Mrs. Hill to make false statements as to the conduct of appellee or to show in the slightest degree that he knew, or had reason to know, that they were not true as she made them. If he believed the statements of his father he was warranted in relying upon the information as to what Camron would swear. In determining whether or not there is sufficient probable cause for instituting a criminal prosecution, it is not necessary to verify the correctness of each item of information, but it is sufficient to act with reasonable prudence and caution in that regard. It was not, therefore, necessary that appellant should have gone in person to Camron and interrogated him as to what he would swear before acting on what he had learned, as to that fact. Hilliard on Torts, Vol. I, 417; Harpham v. Whitney, 77 Ill. 32; Anderson v. Friend, 71 Ill. 475. W. H. Green, the prosecuting attorney of Jefferson County, who appeared for the people on the preliminary trial of appellee, testified on behalf of appellant, that Mrs. Hill did swear on that trial that some time in the evening of the assault after her husband had retired, "Green Mays came in and he seemed to be nearly out of breath. She noticed he had on boots and it appeared he had been splashed up with mud some way and he made some remark about his boots; that he stayed all night there and

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made a statement about having a hell of a time at Jefferson City. The next morning her husband wanted him to work for him, and he would go to the door and then come back, and then go to the door and look out again and before he left he said if any one asked for him not to tell them where he had gone." He also says another witness, who was at Hill's that night, testified to the condition of Mays when he came there saying, "he was as white as a sheet." The Justice of the Peace who tried the case also testified that Mrs. Hill swore on the preliminary hearing that "Green Mays came in about 9 o'clock, between 8 and 9, and that he seemed to be excited and that his clothing was bespattered with mud. He said to her that he had a hell of a racket with old man Gardiner. I forget whether he had a hell of a racket or a hell of a time with old man Gardiner." Appellee also introduced evidence explaining his presence in the neighborhood of Gardiner the evening of the assault and proved a good reputation. He admits, however, that on that evening he was intoxicated. He denies that he made the statements attributed to him by Mrs. Hill, except as to his request that she should not tell that he had been there that night, which he says was made because he did not want his wife to know it. He shows by Camron that he met him that evening and drank with him out of his bottle, and that he made no threats and Camron did not tell Gardiner that he did. He swears that he did not assault the old gentleman and that he was never at his place. The evidence all considered was not sufficient to satisfy a jury that he was guilty of the crime, and therefore he was acquitted of the charge; but is it sufficient to show a want of probable cause? It must be remembered that the burthen of proof to show want of probable cause is on plaintiff, and that he must make that proof clear and satisfactory. Hilliard on Torts, Vol. I, p. 417, 420; Davie v. Wisher, 72 Ill. 262; Angelo v. Faul, 85 Ill. 106.

That some one was guilty of the crime charged against appellee is not denied. There is not the slightest evidence in the case to raise even a suspicion that any one else committed it, or that appellant had reason to suspect any one else. The evidence, we think, wholly fails to show a want of probable

cause, but all considered, does show such a state of facts as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that appellee was guilty, and this is probable cause in law. It is not a question of actual guilt, but of honest and reasonable belief of the party prosecuting. *Harpham v. Whitney*, 77 Ill. 32, and cases cited. Nor are we satisfied from the whole record that the jury were warranted in finding malice, the other necessary element in this action. It is true, malice may be inferred from want of probable cause, but such an inference is not always warranted. "If the defendant can not justify by proof of probable cause, he may still rebut the presumption of malice by showing facts and circumstances to produce at the time on the mind of a prudent and reasonable man a well grounded belief or suspicion of the parties' guilt." *Hilliard on Torts*, Vol. I, 486; *Harpham v. Whitney*, 77 Ill. 32. It is impossible for us to determine from the evidence whether or not appellant communicated to the prosecuting attorney all the facts known to him, or which he might have known by reasonable diligence, and we are not disposed to interfere with the verdict and judgment below on the ground that he acted under the advice of counsel, though we find no ground for believing that he wilfully withheld any information in his possession or stated to him more than he honestly believed he could prove. We feel compelled to reverse this case on the ground that want of probable cause and malice have not been proved. To hold otherwise would require of every one instituting a criminal prosecution proof of guilt sufficient to convict. Here were circumstances and testimony of witnesses tending strongly to establish the truth of the charge. They were held sufficient by the Justice of the Peace to bind over, and by the grand jury to indict. The prosecution only failed when appellee was put upon his final trial and where the law gave him the benefit of all reasonable doubt. We do not say that his acquittal depended upon a mere doubt. The verdict should have been for the defendant and there was error in overruling his motion for a new trial and for that reason the judgment of the Circuit Court will be reversed.

Judgment reversed.

Penn v. Taylor.

JOSEPH PENN
V.
JOSEPH TAYLOR.

Mines—Removal of Supports—Action by Owner of Land for Damages—Instructions.

In an action by the owner of certain lands to recover damages caused by the removal of supports in a coal mine, it is *held*: That the record contains evidence which tends to support the plaintiff's declaration and which he is entitled to have passed upon by a jury under proper instructions; and that an instruction given for the defendant, touching the measure of damages and assuming a "general decrease in rents," is fatally defective.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. DILL & SCHAEFER and WILLIAM WINKELMANN, for appellant.

Messrs. WILDERMANN & HAMILL and J. B. HAY, for appellee.

WILKIN, J. This suit was commenced by appellant against appellee and the Gartside Coal Company to recover damages for injuries to his land and certain buildings thereon by reason of the removal of stone coal underneath it without leaving sufficient supports for the surface. In March, 1859, one McFarlan, then owning the land, sold the coal under it to Joseph Gartside, who in 1873 sold it to the Gartside Coal Company, and in 1883 this company sold "all the coal contained in the pillars" to appellee. In 1878, the land was sold at master's sale and purchased by appellant. This action is for damages alleged to have been caused by appellee since he purchased the coal in the pillars by so weakening and removing the supports to the surface as to cause the same to break, sink, etc. The

verdict and judgment below being for appellee, the case is brought here by appellant. On the trial appellee testified, "I offered to buy this land of Mr. Penn, offered him the same price he paid for it and even asked him what he would want for it." There was also some evidence to the effect that the land had rented for as much since the alleged injury as before. At the instance of appellee the court instructed the jury that "If it appears from the evidence that the plaintiff since the injury complained of in the plaintiff's declaration has rented his land and house for as much as he rented them before, considering the general decrease in rents, and that the plaintiff has been offered as much, and can or could sell it for as much, as he paid for it, since the supposed injuries occurred, then the plaintiff has not sustained any substantial damages."

This instruction is so flagrantly erroneous that asking and giving it must have been the result of inadvertence. The first clause is erroneous and misleading in assuming that there had been a *general decrease in rents*; but the latter clause is still more objectionable and announces an unheard-of rule of law in actions of this kind. According to the rule here announced, if one should have entered lands at government prices, valuable for the minerals under it or timber on it, and a trespasser should remove all the mineral or timber and then offer to pay the owner the price for which he entered it, no substantial damages could be recovered. The proposition is absolutely defenseless and the learned counsel for appellee only attempt to do so indirectly. They say, "if the rental value of the land had not decreased and its selling value had not decreased and its uses for farming purposes had not been substantially injured, how was it damaged?" The instruction, it will be observed, ignores entirely the question as to whether the "selling value" of the land has been decreased by the injury and takes away the right to substantial damages, if the selling price was as good as that paid for it by appellant. We are not dealing with the question of the competency of evidence or what certain evidence tends to prove and need not therefore notice the authorities cited by appellee which bear on these questions, but in no manner sustain the legal proposition

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announced in the objectionable instruction. It is not claimed that the error in this instruction is cured by others given either on behalf of appellant or appellee. It is insisted, however, that, notwithstanding the error it may contain, there should be no reversal, because it appears from the whole record that the right is with the appellee. We recognize the rules contended for by appellee that a new trial should not be granted where substantial justice has been done, notwithstanding irregularities and errors committed on the trial, but we do not regard this case as falling within that rule. We do not assume to pronounce upon the merits of the case under the evidence, but hold that there is proof in the record tending to support plaintiff's declaration, and which he has a right to have passed upon by a jury under fair instructions. By the instruction referred to the merits of the case were as effectually taken from the jury as if it had been instructed to find for the defendant. As the case must be reversed, any expression of opinion as to the weight of testimony would be improper and a review of it is therefore unnecessary.

Reversed and remanded.

MARIE SCHIFFERSTEIN

V.

E. H. ALLISON.

*Mortgages—Foreclosures—Limitations—Sec. 11. Chap. 83. R. S.—
Equity of Redemption—Rights of Purchaser—Payment of Note.*

1. The right to foreclose a mortgage continues until the debt which it secures is barred. Whatever arrests the running of the Statute of Limitations against the debt, arrests its running against the mortgage. Whatever recognizes the debt as still subsisting, also recognizes the mortgage by which it is secured.

2. Sec. 11, Chap. 83, R. S., is merely a legislative declaration of the rule previously established by the Supreme Court.

3. A mortgage can be enforced against the purchaser of the mortgagor's equity of redemption, at a sale made when the mortgage was upon its face

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in full force and effect, at any time within ten years from the last payment upon the note secured by such mortgage.

[Opinion filed October 5, 1887.]

IN ERROR to the Circuit Court of Jasper County; the hon. WILLIAM C. JONES, Judge, presiding.

On the 23d day of October, 1874, Samuel R. Sandefur and his wife, Emily, executed their promissory note to Valentine Krauss, for the sum of \$300, payable in one year from date with interest at the rate of ten per cent., payable annually. On the same day they made their certain mortgage deed to secure the payment of said note upon the premises described in the bill. At the February term, A. D. 1878, of the Jasper Circuit Court, plaintiff in error recovered a judgment against Samuel R. Sandefur and others for the sum of \$2,441.16 and costs, and execution was issued thereon February 13, 1878, and returned "no property found." An alias execution was issued upon said judgment November 22, 1883, and levied upon the equity of redemption of said Samuel in the mortgaged premises, and the same were sold thereunder to plaintiff in error, and not being redeemed she obtained a deed from the Sheriff on June 13, 1885. On the 23d day of March, 1883, Krauss sold and assigned the note and mortgage to the defendant in error who filed this bill to foreclose said mortgage on the 19th day of November, 1886. Six annual payments of interest were made upon the note and later two partial payments, the last of which was made December 12, 1882. The defense to the foreclosure, relied upon, is that the Statute of Limitations bars the proceeding, as the bill was not filed within ten years after the maturity of the debt. The court decreed a foreclosure and the defendant below, Schifferstein, sued out this writ of error to reverse the decree.

Messrs. GIBSON & JOHNSON, for plaintiff in error.

"No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues." Sec. 11, Chap. 83, R. S.

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The note, which the mortgage secures, having been given October 23, 1874, payable one year after date, the right of action to foreclose the mortgage accrued October 27, 1875. The action to foreclose the mortgage in suit was commenced November 19, 1886,—over eleven years after the right of action accrued.

The mere fact that payments of interest were made upon the note can not affect the rights of the parties to this suit; because, after the right of action had accrued, such payments did not suspend the right of action. Krauss, the payee of the note, could have brought suit upon it at any time after October 26, 1875, or could have brought his bill to foreclose the mortgage, and his action in either proceeding could not have been defeated by showing payments of interest upon the note, whether a mortgage was a lien upon real estate or not, after the maturity of the note or notes which it was given to secure; for the reason that a payment upon the note or notes by the payee perpetuated the right of action by removing the bar of the Statute of Limitation; and the right to foreclose the mortgage inured to the holder of the note until the note itself was barred by limitation. Under this doctrine a mortgage to secure a note, which by the public record would appear to have been barred a half century, might be a valid and subsisting lien upon real estate.

The statute under discussion obviates this manifest evil, and the inquirer can ascertain at a glance, from the record, whether the right of action to foreclose a mortgage has accrued, and whether ten years have elapsed since it accrued; and, if so, he can know that he is dealing with the real estate covered by it, discharged from the lien of such mortgage.

There is no hardship in this. Ten years is certainly a sufficient time in which to bring foreclosure proceedings after the right of action accrues. A party who fails to do so is in no worse situation than is he who allows the lien of his judgment upon real estate to lapse by failing to sue out execution within a year from the time of the rendition of the judgment, or than any one else who allows a Statute of Limitations to run against him, and, by his own negligence, loses his right of action.

Mr. JOHN P. HEAP, for defendant in error.

Under our laws, the mortgagee's right of foreclosure is not barred until the debt itself is barred by the Statute of Limitation. Hagan v. Parsons, 67 Ill. 170; Harris v. Mills, 28 Ill. 44; Brown v. Devine, 61 Ill. 260; Medley v. Elliott, 62 Ill. 532.

The mortgage is an incident to the debt, and but a security, but it confers the right to reduce the premises to possession as a means of obtaining satisfaction of the debt, and, to render the right effective, ejectment may be maintained against the mortgagor at any time that a recovery may be had on the debt. The mortgagee may resort to any of the various modes of foreclosure so long as his debt is capable of being enforced, but no longer. Pollöck v. Maison, 41 Ill. 516.

The Statute of Limitation which bars the debt, the principal, can alone bar the mortgage, the incident. Medley v. Elliott, 62 Ill. 532.

By the payment of interest the payor made a new promise to pay, and gave the holder of the mortgage a new right to foreclose. Had the note been barred by Sec. 16 of the Statute of Limitation, this payment would have revived the note, and necessarily the mortgage, and given the holder of the mortgage the right to bring an action to foreclose the same.

The right, then, to foreclose the mortgage would have accrued at the time of such payment, and would have continued for ten years from that date. Every new payment, or promise to pay, gives the holder of the note a new right to collect the unpaid part of it, and a new right accrues to foreclose the mortgage to enforce such collection.

Construing the two sections together, it can not be said that the action to foreclose the mortgage must be brought within ten years from the time the right of action *first* accrues, but within ten years from the time the right *last* accrued.

In the case at bar a partial payment was made on the note December 12, 1882. By that payment Sandefur, the payor of the note, acknowledged the debt and promised to pay the balance due, thereby giving the holder of the note the right to collect it and the right to foreclose the mortgage. As this

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suit is brought within ten years from the time the right accrued by virtue of such partial payment, there could be no error in decreeing a foreclosure of the mortgage.

A new promise renews the obligation. *Brockman v. Sieverling*, 6 Ill. App. 512. An unconditional part payment takes the case out of the statute. *Paris v. Hunter*, 10 Ill. App. 230.

Taking a case out of the statute, either by a new promise or partial payment, has the effect to fix a new date at which the statute begins to run.

PILLSBURY, J. The holding of the courts in England, and in most of the States of the Union, that a mortgagee, notwithstanding the debt is barred by the statute, might still assert his right under the mortgage to enforce the lien in analogy to the Statute of Limitations respecting actions for the recovery of real estate, has not been recognized by our courts. Here it is the settled doctrine that the debt is the principal thing, and the mortgage security but a mere incident, and anything that discharges the debt will have the effect of destroying the lien created by the mortgage, and can be set up as a defense to any proceeding instituted upon the mortgage to obtain satisfaction of the debt, whether by ejectment, *scire facias* or bill in equity to foreclose. *Harris v. Mills*, 28 Ill. 44; *Brown v. Devine*, 61 Ill. 260; *Medley v. Elliott*, 62 Ill. 532; *Emory v. Keighan*, 88 Ill. 482.

It was said in *Medley v. Elliott*, *supra*, "that the mortgage is but an incident attached to the debt, and in reason and propriety it can not and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the land." And again, "that when recovery upon the note is barred, the right of foreclosure is also barred. The converse must be equally true." *Emory v. Keighan*, *supra*, was an action of ejectment, wherein the plaintiff, Emory, showed a *prima facie* right to recover, and Keighan defended his possession under

a sale made by virtue of the power of sale contained in a mortgage; but it appearing that the sale had been made more than sixteen years after condition broken in non-payment of the debt, if it ever was broken, it was held that the Statute of Limitation barred the debt, as nothing appeared to take the case out of the statute, and that taking possession under the mortgage sale, after the right of entry was tolled by lapse of time, could not revive the debt nor the power of sale so as to confer upon the defendant any title. From these decisions it is manifest that the courts, whether of law or equity, had fixed as determinate a time when the right of entry under the mortgage should be tolled by lapse of time, as though it had been declared by legislative enactment. That time was determined to be that fixed by the statute for the barring a recovery upon the debt secured by the mortgage, and not the time prescribed for the recovery of real property. When the bar of the statute became complete as to the debt, it was equally so as to the mortgage, regardless of the character of the proceeding taken to enforce it. The vitality of the mortgage lien depended upon the continued existence of the debt, and, when the debt fell, the lien went with it. We are, then, to inquire whether the party seeking to enforce the lien of his mortgage, after the expiration of the time limited by the statute for the commencement of an action to recover the debt, could show that such lien was still subsisting by proving any of the grounds known to the law for arresting the running of the statute against the debt; whether, keeping the debt alive, the mortgage lien, as such incident, was so closely connected with and attached to the debt as to still continue a substantial right in the mortgagee for the collection of the debt. Speaking of the presumption of payment arising from the lapse of time, it is said in Jones on Mortgages, Sec. 1196, that this presumption is not conclusive but may be controlled by evidence of part payment of the principal or interest, or other admissions or circumstances from which it may be found that the debt is still unpaid, but parol evidence, to control this presumption, should clearly show some positive act of unequivocal recognition of the debt within that time; and again, Sec. 1198, "that

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a payment of interest or part of the principal renews the mortgage so that an action may be brought to enforce it within twenty years after such last payment. This is a rule universally recognized."

Hough v. Bailey, 32 Conn. 288, was a case where a bill was filed to foreclose a mortgage after the expiration of fifteen years, the time limited in that State for barring such action where the mortgagor has been in possession, and to overcome the bar of the statute it was proved that the mortgagor, within the fifteen years, had acknowledged the existence of the debt and promised to pay it. As to the effect of such promise upon the mortgage, *Hinman*, C. J., said: "This recognition of the debt as still subsisting against him was, in effect, a recognition of the mortgage as a security for it, and prevented the time then elapsed from being counted or considered as any part of the fifteen years' uninterrupted possession necessary in order to bar the mortgagee's right to bring ejectment or to foreclose the mortgage." *Emory v. Keighan*, 94 Ill. 543, is the same case reported in the 88th Ill., above cited, being taken to the Supreme Court a second time. On a new trial at the circuit, the defendant, in order to avoid the effect of the statute declared in the former opinion, proved that the mortgagor under whom he claimed had been out of the State a sufficient length of time to prevent the statute barring the note at the time the sale was made under the mortgage at which he became the purchaser. It was urged that the statute only permits the deduction of time the debtor was out of the State in actions on the note, and could not be used to uphold the power of sale in the mortgage, but the point was not considered tenable, the court saying: "The power of sale inserted in the mortgage was for the purpose of subjecting the mortgaged property to the payment of the debt so long as it remained in force. Its legal effect was to authorize a sale after the debt matured, so long as it remained in existence and binding on the mortgagor. The mortgage was but a mere incident of the debt, and inhered to it as long as the debt remained in force against the mortgagor, as nothing was done to release or separate it from the debt." Our present act concerning limita-

tion of actions was enacted in 1872, and in the general revision became chapter 83 of the Revised Statutes of 1874, and by it the time for bringing an action upon notes, bonds, etc., was reduced from sixteen to ten years, and in the same act the time for bringing an action or making a sale to foreclose a mortgage was fixed at the same period. This last provision was in legal effect but a legislative declaration of the existing rule. As we have seen, that was applied by both courts of law and equity in this State under the prior statute relating to actions upon the mortgage or mortgage debt; *i. e.*, the time limited for the enforcement of the debt was also applied to the mortgage, and when a recovery was barred upon the former the latter was likewise barred, regardless of the forum wherein it was sought to enforce it; and there can be no doubt that, under the decisions of our Supreme Court in a former part hereof referred to, without this section of the statute especially referring to mortgages, they would have been held subject to the limitation prescribed for the principal thing, the debt, and be barred in the same time as now fixed by the statute, the period of ten years. We do not think that it was the intention of the Legislature to entirely separate the incident, the mortgage, from its principal, the debt, for the payment of which it was pledged, thereby discharging the lien created by it when, under another provision of the same act equally authoritative and positive, and fixing the same limitation, the debt might still be subsisting; but we consider it rather the adoption into the written law of a rule theretofore enforced by the courts in analogy to the existing limitation prescribed by the statute for the recovery of the same debt, the statute now applying whether the debt be evidenced by note, bond, or by the mortgage. We treat this section 11, relating to mortgages, as what, in relation to the debt, has ever been considered a mere Statute of Limitation, to be construed, not as discharging the debt, but as taking away the remedy for the enforcement of its collection, by creating a presumption of its payment and consequent discharge of the lien, unless rebutted by proof of some act of the debtor or mortgagor, unequivocal in its nature, recognizing the continued existence of the mort-

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gage lien as security for the debt. Any act of the debtor, sufficient to take the debt out of the operation of the statute by suspending it for a given time, or by fixing a new date from which the ten years' limitation must again commence to run, is such a clear and distinct recognition of the mortgage as a security for such debt as alike to operate upon it and, by the same act, the bar of the statute, so far as it has run, is removed from both. Whatever recognizes the debt as still subsisting, also recognizes the mortgage as security for it, as it is but the mere incident, and can not, without express agreement, be separated from it. This seems to be the holding in *Hough v. Bailey*, *supra*, and of our courts so far as the question has been presented, as it is likewise in other States having limitation laws relating to the right of entry under mortgages. The rule seems to be founded in reason and supported by authority, and we see no cause for not following it. The appellant here purchased the equity of redemption of the mortgagor while the mortgage was upon its face in full force and effect, ten years from the maturity of the note not yet having elapsed, and it is but reasonable to suppose that she purchased with a full understanding that the premises were pledged for the debt secured by it, and made her bid accordingly. She stands in the place of the mortgagor, and, as in our view the mortgage could be enforced against him at any time within ten years from the time he made the last payment upon the note, while still the owner of the equity of redemption, she is bound by this act of the revival by him of the time from which the limitation is to commence running anew, and still holds the land charged with the payment of this debt. The decree of the court below, being in accordance with the views above expressed, will be affirmed.

Decree affirmed.

Gaunt v. Froelich.

JOHN GAUNT
v.
HENRY FROELICH ET AL.

Mistake in Levy of Attachment, Special Execution and Certificate of Purchase—Bill to Correct—Subsequent Purchaser—Trust Fund with which to Redeem—Demurrer.

Upon a bill to correct a mistake in the levy of a writ of attachment, in a special execution and in a certificate of purchase, so as to include all of certain lots intended to be included, or to require a subsequent purchaser to pay over a part of the purchase money left with him for the redemption from the sale, it is *held*: That the court below improperly sustained a general demurrer; that the complainant was at least entitled to the alternative relief prayed; that said subsequent purchaser holds the money so left in his hands as trustee for the complainant; and that he can claim no exemption in the execution of his trust by reason of his own violation of duty in failing to apply said fund while the right to redeem existed.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Madison County; the Hon. AMOS WATTS, Judge, presiding.

This was a bill in equity filed in the Madison Circuit Court by the appellant against the appellees, substantially averring that he sued out of said Circuit Court a writ of attachment against said Froelich, for an indebtedness then due and owing, and that, at said time, said Froelich was the owner of lots two, twenty-six and twenty-seven in Meeker and Krafft's addition to Edwardsville, in said county; that the first above described lot by itself was of but little value, but the other two were well improved, the improvements alone being worth above \$3,000; avers that the Sheriff, not being well advised as to the description of said lots, levied the writ upon lot two only, when it was intended by his attorneys, as well as said Sheriff, to make said levy upon the three lots; avers that at the March term of said Circuit Court he recovered a judgment in said attachment proceeding for \$689 and cost of suit, and, upon

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special execution issued thereon, the said lot two was sold for the whole amount of the debt, interest and costs to complainant, but at said time it was supposed by the Sheriff and the complainant that the sale included the three lots instead of the one only: that the certificate of sale contained the same mistaken description. Further, that while complainant still held said certificate of purchase, said Froelich sold and by warranty deed conveyed to appellee, John Keller, the said three lots for the sum of \$2,856.50, and that said Keller, before his purchase, had the title examined and, having notice of the mistake before recited and with the consent of said Froelich, reserved from said consideration a sum sufficient to redeem said lot two from the sale to the complainant, and that the money was left with Keller by Froelich for the purpose and to be so used by him in making such redemption. The prayer of the bill is in the alternative, either that the mistake in the levy of the writ of attachment, as well as under the execution and in the certificate of sale be corrected so as to include the said three lots, or, if this can not be done, that said Keller be decreed to pay over to complainant the said sum of money for the redemption from said sale left with him by Froelich to be so applied and thereby make said redemption effectual. A general demurrer was interposed to the bill by defendants, and being sustained by the court, the bill was dismissed and complainant below appealed to this court.

Messrs. HAPPY & TRAVOIS, for appellant.

The relief sought by the bill, as amended, is two-fold:

First—The correction of the levy of the writ of attachment, special execution and certificate of purchase.

Second—The enforcement of a trust.

If either of these claims for relief is proper for the jurisdiction of a court of equity, the demurrer should have been overruled, and the bill retained. *Gooch v. Green*, 102 Ill. 507; *Pool v. Docker*, 92 Ill. 501.

It appears that the entire property was conveyed to defendant Keller, by warranty deed, and to make the warranty good an arrangement was entered into between Froelich and Keller

by which the latter reserved from the purchase price a certain sum for the express purpose of redeeming from the Sheriff's sale by appellant and clearing the title; and now in violation of this agreement and the confidence reposed in him, he retains the money and refuses to perform the trust. Under this arrangement with his vendor he took the property, not merely as owner but as trustee, clothed with a duty to perform in respect thereto, and a court of equity will not hesitate to enforce its performance. *Doolittle v. Jenkins*, 55 Ill. 400; *Freer v. Lake*, 115 Ill. 662; *Rodney v. Shankland*, 12 Am. Dec. 70; 2 Story's Eq. Jur., Secs. 1041, 1213; *Stockard v. Stockard*, 46 Am. Dec. 79; *Cooper v. McClun*, 16 Ill. 435; *Coates v. Woodworth*, 13 Ill. 654.

Messrs. DALE & BRADSHAW, for John and Sarah Keller, appellees.

The sale of the lot and the bidding of it in by appellant, under the special execution, for the full amount of his judgment and costs, operated as a complete payment, discharge and satisfaction of his judgment.

Unless it be where a fraud is practiced upon the purchaser, the doctrine of *caveat emptor* applies in all judicial sales; the officer selling has no power to warrant title or impose terms or conditions on the sale beyond those required by law; the purchaser is presumed to have examined the title and to know what he is acquiring. *Bishop v. O'Conner*, 69 Ill. 431; *England v. Clark*, 4 Scam. 486.

It is said the lot was not worth what appellant bid it in for. The law is, if loss ensues the purchaser must bear it. *Roberts v. Hughes*, 81 Ill. 130.

Caveat emptor is universally applied in judicial sales. *Owings v. Thompson*, 3 Scam. 502; *McManus v. Keith*, 49 Ill. 388; *Walbridge v. Day*, 31 Ill. 379.

In the absence of all fraud, a court of equity can not relieve a purchaser at a judicial sale on the ground that the title fails. The maxim *caveat emptor* is the same in equity as in law in respect to such sales. *Holmes v. Shaver*, 78 Ill. 578; *Bassett v. Lockard*, 60 Ill. 164.

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It is said that when Froelich sold to Keller, he (Keller) reserved out of the purchase price a sum sufficient to redeem from appellant's sale. Suppose he did? It was a matter purely between Froelich and Keller. Appellant was no party to this arrangement. Neither Froelich nor Keller owed appellant a dollar. Keller may have thought at the time that he might redeem lot two, and as appellant would not be willing to take less than his bid and interest, Keller and Froelich had a perfect right to make that arrangement, and Keller could redeem or not, as he liked. Appellant could have no remedy even against Froelich; could he have any against his grantee? Froelich, had he continued to own the property, would have been under no legal or moral obligation to redeem from appellant's sale. Neither Froelich, his attorney nor his agents, made any representation to induce appellant to make the purchase he did. Appellant purchased—had his levy and sale made—with the records open before him, and he acquired all he had a right to expect without any redemption, and if he has sustained any loss it has been purely by his own *laches* and a court of equity has no power to compel any one else to help him sustain it.

PILLSBURY, J. Without, at this time, discussing the question whether a court of equity would grant the relief upon the ground first stated in the bill by correcting the mistake in the levy of the writ of attachment, the levy of the special execution and in the certificate of purchase, we have no doubt that a general demurrer would not lie to the bill, as under the second ground set up for relief the complainant, by his bill, has shown himself entitled to the alternative relief prayed.

When Froelich conveyed the premises to Keller, according to the averments of the bill, they had notice of the alleged mistake, as well as of the state of the title, and Froelich conveyed by warranty deed the whole three lots for a consideration considered adequate for a perfect title. Knowing of complainant's claim by virtue of his certificate of purchase, and to protect his covenants in his deed, he left sufficient money in the hands of Keller, the purchaser, to be applied by him in

discharge of said incumbrance, and Keller in accepting the money undertook to discharge the trust thus imposed upon him and voluntarily assumed by him.

No one will doubt that the grantor had the right to direct the payment of enough of the purchase money to complainant to clear the title, and Keller having accepted the money to be thus applied, can not now be heard to say he is willing to lose the title to lot 2, as it is far less in value than the money left with him to pay off the incumbrance. The money was left with him for a specified purpose, and by accepting he undertook to apply it as requested. It is true that it does not appear from the bill that he bought subject to the incumbrance and promised to discharge it as part consideration of the purchase, thus creating an assumpsit upon which complainant could maintain an action at law under our decisions, but this only goes to show in a clearer light, that he accepted the money as a trustee for the complainant, to be paid to him in discharge of his incumbrance.

It was the duty of Keller to thus apply the money at once while the right to redeem existed, but he can claim no exemption in the execution of such trust occasioned by his own violation of duty, so long as the complainant insists upon its performance.

We think these principles are too elementary to require the citation of authorities to support them.

The very fact that complainant has come into a court of equity asking for a decree compelling Keller to apply the money left with him for the purpose of making the redemption to that purpose, is a sufficient allegation that the complainant is willing and ready and offers to have such redemption made and perfected.

Upon this ground in the bill if no other, the complainant was entitled to relief, and the court should have so decreed, and, as it did not, its decree dismissing the bill will be reversed and the cause remanded to the end that a hearing may be had upon the merits.

Decree reversed.

Mitchell v. Hughes.

JOHN W. MITCHELL

V.

S. W. HUGHES.

Mutual Accounts—Conflict of Evidence—Question for Jury—Wife as Witness—Competency of—Bill of Exceptions.

1. Where the evidence is conflicting and the record discloses no error in the instructions, admission of improper evidence, nor misconduct or prejudice of the jury, this court will not interfere with the verdict.

2. In an action involving an account for board, it is *held*: That the testimony of the plaintiff's wife, to the effect that her husband was absent most of the time and that in his absence she managed the hotel for him, is sufficient proof of her agency to render her a competent witness.

3. This court declines to consider an objection, first raised in the brief for appellant, that the bill of exceptions which appears in the record is not marked filed by the clerk of the court below.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Saline County; the Hon. DAVID J. BAKER, Judge, presiding.

Messrs. CHRISTY & LEWIS and PARISH & PARISH, for appellant.

Messrs. W. H. BOYER and W. V. CHOISSER, for appellee.

WILKIN, J. The point is made by counsel for appellee that the bill of exceptions in this record does not appear to have been filed in the office of the clerk of the Circuit Court of Saline County, and should therefore be disregarded. It seems to have been duly signed by the Circuit Judge who tried the case, within the time fixed by his order upon overruling the motion for a new trial. It appears in the complete record certified by the clerk. The objection that it is not marked filed is first raised by appellees in the brief and argument filed in the case, and for the purposes of the argument on the merits both sides treat it as a bill of exceptions in the case, and we shall so consider it in this decision.

The action grows out of a dispute between the parties as to the state of accounts between them, running over a term of several years. Appellee had judgment below for \$314.18, and for costs. He claimed a much larger amount, and appellant contended he owed him nothing. In this court appellant urges but two grounds of reversal, and they may be very briefly disposed of.

One item in the account of appellee was a charge of \$300 for boarding railroad hands for appellant in 1872. On the trial he introduced as a witness to prove that item, Nancy P. Hughes, his wife, who was objected to by appellant on the ground that, being the wife of appellee, she was incompetent. The objection was overruled. Before the objection was made she had testified: "I am the wife of the plaintiff; S. W. Hughes was running a hotel that year. He was absent almost all the time. *I run the hotel for him.*" This is sufficient proof of her agency in the conduct of her husband's business to make her a competent witness in his behalf as to that particular business, and on that branch of the case the ruling of the court below was right. Sec. 5, Chap. 51, R. S.

The remaining ground of reversal insisted upon and argued at great length is, that the verdict of the jury is contrary to the evidence. It is not contended that there is no evidence to support the finding, but it is claimed that the verdict is manifestly contrary to the weight of the evidence, and for that reason the judgment should be reversed.

We have carefully considered the elaborate review of the evidence by counsel on both sides, and in connection therewith examined the testimony. We do not find it easy to arrive at a satisfactory conclusion as to the true state of account between the parties. We have experienced the disadvantage at which a court of review is always placed in settling disputed questions of fact, by being deprived of the privilege of seeing the witnesses and hearing them testify.

Nothing, however, appearing in the record to show the slightest misdirection to the jury in instructions, nor the improper admission or rejection of testimony, nor misconduct or prejudice of the jury, we are unauthorized by the evidence

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to substitute our conclusion for theirs, and especially as it has the indorsement of the trial Judge, who, with them, had the better opportunity to weigh and give credit to the evidence of the various witnesses. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

HENRY BINGER

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Elections—Alteration of Ballots—Indictment—Election of Town Officers—Application of General Laws.

1. An indictment charging the defendant with having altered and defaced a ballot legally voted at an election for township officers, after it was put into the ballot box, is sufficient to sustain a conviction.

2. The general laws of the State in regard to elections apply to elections for town officers at elections held under the Township Organization Act.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Madison County; the Hon. AMOS WATTS, Judge, presiding.

MESSRS. DALE & BRADSHAW, for appellant.

MR. GEORGE F. McNULTY, State's Attorney, for appellees.

PILLSBURY, J. At a former term of this court we reversed a conviction of the plaintiff in error, had upon an indictment charging him with the offense of changing a ballot when acting as a judge of an election, and remanded the cause. 21 Ill. App. 367. He was then indicted for the same offense but not as such judge, and waiving a jury, was tried by the court and found guilty and fined \$50, and he again brings the case here.

The point is again made that an annual town meeting for

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the election of township officers is not such an election as comes within the election law relative to offenses of this character.

In our former opinion we gave our reasons for holding otherwise and have no desire to restate them. Again it is urged that the indictment is not sufficient to support a conviction, as it is uncertain therefrom, whether the ballot was changed before or after it was voted. We have carefully examined the indictment and are of the opinion that the first count does sufficiently charge the offense to be the changing of the ballot after it had been put in the ballot box. The evidence shows a clear violation of the law and one deserving much greater punishment than was inflicted.

The plaintiff in error has no cause of complaint, and no other point materially affecting the merits being made, judgment will be affirmed.

Judgment affirmed.

AARON BAER ET AL., LATE PARTNERS,

V.

LOUIS LICHTEN.

Agency—Transfer of Note—Unauthorized Indorsement—Ratification—What Necessary to Charge Indorser—Insolvency of Maker—Burden of Proof.

1. Where a principal accepts and retains the proceeds of a note, knowing that it was transferred by his agent upon an unauthorized indorsement, he thereby ratifies such indorsement.

2. In order to charge the indorser of a promissory note the holder must use due diligence.

3. Where a note is assigned after maturity, to charge the indorser, the assignee must bring suit against the maker at the first term of court, unless he can show that such suit would be unavailing or that the maker had absconded when the note was assigned.

4. Where the plaintiff in a suit against the indorser relies upon the insolvency of the maker, the burden is upon him to show that such insolvency continued until the commencement of the suit.

[Opinion filed October 5, 1887.]

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APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. WILLIAM WINKELMANN, for appellants.

Appellee knew that he had not requested nor had appellants agreed to indorse the note, yet with this knowledge, when the note is presented to him as agreed on, and the exchange about to be made, he urges and persuades the servant of appellants, and unknown to them, to make another contract, to wit, the indorsement in question, which is not merely a transfer of the note, but is a fresh, independent and substantive contract, embodying all the terms of the instrument indorsed. 1 Daniel on Neg. Instruments, page 533 to 538.

In the case of *Gerrish v. Maher*, 70 Ill. 470, the court say: "When an agent is employed mainly to carry out and perform a contract already made by his principal, he is not authorized to change the contract or to make a new one."

In *Garrity v. Bells*, 20 Ill. App. 327, the court say: "If at the time a promissory note falls due, proceedings against the maker would be unavailing, the holder may proceed immediately against the indorser; but if he will not do this he must be prepared, in order to fix the liability of the indorser, to show that the insolvency of the maker continued down to the time of the commencement of his suit against the indorser." *Bledsoe v. Graves*, 4 Scam. 382; *Phillips v. Webster*, 85 Ill. 146.

Messrs. WILDERMANN, HAMILL & RICKERT, for appellee.

The mules, together with the \$3,300 note of Lichten, were delivered by Reifschneider to the firm of Baer Bros. & Wohlgemuth, together with the information in what manner he had indorsed the Fults note to Lichten. They made no effort to rescind the unauthorized acts (as claimed) of their agent in any part of this transaction, but on the contrary appropriated the property to their own use, and by their open and approved acts affirmed and ratified his conduct as agent in the whole proceedings. *Ward v. Williams*, 26 Ill. 447; *Johnston v. Berry*, 3 Ill. App. 256; *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227.

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A principal can not enjoy the benefits arising from the act of his agent without adopting the instrumentality by which it was accomplished. *McBean v. Fox*, 1 Ill. App. 177; *Elwell v. Chamberlain*, 31 N. Y. 611; *Smith v. Tracy*, 36 N. Y. 79.

An agent empowered by his principal to do a particular act must necessarily be invested with the unlimited authority and means to perform and execute the act. *Noble v. Nugent*, 89 Ill. 522.

WILKIN, J. This is an action of assumpsit brought by appellee against appellants as indorsers to him of a promissory note made by Valentine Sigerte and Jacob C. Fults, June 5, 1883, for \$415, due twelve months after date, payable to Loewenstein, Baer & Bro., and by them assigned to appellants.

The assignment upon which this suit is brought is "Baer Bros. & Wohlgemuth, S. Reifschneider, agent," and was made August 25, 1885. On the trial in the Circuit Court appellee obtained judgment for the amount due on the note and appellants bring the case up by appeal.

It is insisted, first, that there is no proof of the agency of S. Reifschneider and that therefore appellants can not be held liable as indorsers.

It appears that appellee got the note in payment for a span of mules, the price of which was \$300, he giving his note to appellants for \$33, the amount then due on the assigned note above the price of the mules. Appellee testified that he made the trade with Aaron Baer, one of the appellants, who could not come after the mules himself but said "I will send my agent, Reifschneider, and he will do as well as I will." In this he is corroborated by James Matthews and Wm. Fults. Reifschneider did call for the mules and deliver the note, taking the \$33 note in appellant's name, and at the request of appellee made the assignment above mentioned. He testifies, however, that he had no authority for so doing, as does Amson and Aaron Baer. They claim that one George Schab was sent with the note and to return the mules, and that Reifschneider was not in their employ but went at the request of Schab. There is unquestionably a sharp conflict in the evidence on

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this question and if it depended upon the express agreement of the parties as to who should transact the business, it might well be doubted whether there is sufficient authority shown in the agent to bind appellants, but it does clearly appear that they accepted the mules and the small note, and, with full knowledge of the fact that the note was indorsed by Reifschneider as their agent, have retained both, and at no time offered to return them. In fact, they transferred the \$33 note and it was collected off of appellee.

There need be no citation of authorities in support of the position that if the property obtained by the indorsement of the note was retained by appellants with a full knowledge of the facts, such conduct would amount to a ratification of the act of the agent, although unauthorized at the time it was done. It is contended by appellants that, inasmuch as one of their firm told appellee that he wanted it distinctly understood that they were not liable for the note, that they thereby repudiated the act of the agent. It is shown, however, that in the same conversation this member of the firm inquired of appellee why he was so particular as to make Reifschneider indorse the note, saying, "We always indorse without recourse," thereby showing a knowledge of the fact that appellee had required the indorsement before surrendering the property and giving his note. Clearly, he could not then repudiate the agency by which the indorsement was made and the property obtained, and, at the same time, keep the proceeds. We find no warrant in the evidence for the position that the trade was completed between appellee and Amson Baer, and that, by its terms, appellee was bound to take the note unindorsed. There is nothing to show any such understanding.

The second ground of reversal urged is, that appellee has failed to prove due diligence on his part in attempting to collect the note from the makers. He got the note on the 25th day of August, 1885, and it was then past due.

In order to show due diligence by suit, it was necessary that he should bring his action to the next term of the court having jurisdiction, and to have prosecuted it to judgment at

the earliest period within his power, had execution issued, etc. Robinson v. Olcott, 27 Ill. 181.

The next term of court in that county, to which he could have sued on the note, began on the fourth Monday of September, A. D. 1885, and no reason whatever is shown for not so doing. Suit was delayed until the January term, A. D. 1886, of the County Court.

Diligence by suit has not, therefore, been shown. It then devolved upon appellee, under the other allegations of his declaration, to show that the maker, Sigerte, had absconded and left the State when the note was assigned to him, or to show that both the makers were insolvent. Pierce v. Short, 14 Ill. 144. Whatever may be said as to the proof of Sigerte's absence from the State or his insolvency, we think there is an absence of proof that a suit against Jacob Fults at the September term, A. D. 1885, would have been unavailing. Appellee swears that at the time he got the note he thought him good; that it turned out he was insolvent, "had nothing when the suit was brought against him." When he became insolvent he does not pretend to state. The attempt to supply the omission in his testimony in chief by showing on his re-examination by parol that Jacob Fults had conveyed his interest in certain real estate prior to 1885, is unavailing for two reasons: First, the evidence was incompetent, and, second, it nowhere appears that between the time appellee got the note, and the suit, in January, 1886, he did not have other property than the real estate out of which the debt could have been collected.

Again, there is no proof whatever of Fults' insolvency from April 25, 1886, to the date of bringing this suit, a period of about one year. Having failed to show diligence by suit to the first term after he got the note, the burthen of proof is upon appellee to show that the insolvency of the makers continued down to the time of the commencement of this suit. Bledsoe v. Graves, 4 Scam. 382. This is not done by showing a return of execution *nulla bona* a year before. For want of proof of due diligence by suit and of the insolvency of Jacob C. Fults, one of the makers of the note, the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

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GABRIEL PEPPER, SURVIVING PARTNER,
V.
CATHERINE PEPPER, ADMINISTRATRIX.

Administration—Real Estate as Partnership Property—Tenancy in Common—Rents and Profits—Parties—Former Adjudication.

1. Real estate becomes partnership property, as a general rule, when it has been purchased for partnership purposes, appropriated to such purposes and paid for with partnership funds.

2. The legal title of partnership realty is held by the partners as tenants in common, subject in equity to the partnership debts. When the firm debts are paid all the incidents and qualities of real estate revive. It then descends to the heir, and the rents, issues and profits pass to him and not to the administrator.

3. In the case presented, it is *held*: That the farm in question was owned by the partners as tenants in common; that upon the death of one of them, the other is not liable to the widow, as administratrix, for rents and profits; and that the doctrine of *res adjudicata* applies with respect to former proceedings for assignment of dower and partition, although the widow now sues as administratrix.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of Madison County; the Hon. AMOS WATTS, Judge, presiding.

Messrs. HAPPY & TRAVOIS, for appellant.

Appellee, as a party to the partition suit, is estopped by the decree and findings of the court and her own conduct in said cause from now setting up any claim for rents, or claiming that said land was held otherwise than in common. Bigelow on Estoppel, pages 60, 65, 148, and chapter 19; Wells' Res Adjudicata and Stare Decisis, Secs. 17, 29, 64; Hamilton v. Quimby, 46 Ill. 90, and notes; Wright v. Dunning, 46 Ill. 271, and notes; Hicks v. Chapin, 67 Ill. 375; Hanna v. Read, 102 Ill. 596; Montague v. Selb, 106 Ill. 49.

Even if the land had been owned and cultivated by appellant and his brother as partnership property, unless it, or the

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rents and profits arising therefrom, were needed for the purpose of liquidating firm debts and settling the account between the partners, the Probate Court has no jurisdiction in the matter. The survivor's accounting must be with his co-tenants. *Strong v. Lord*, 107 Ill. 25; *Parsons on Partnership*, Sec. 373; *Hartnett v. Fegan*, 3 Mo. App. 1; *Lang's Heirs v. Waring*, 25 Ala. 625; *Shearer, adm'x, v. Shearer*, 98 Mass. 107; *Scruggs v. Blair*, 44 Miss. 406; 2 *Lindley on Partnership*, page 664, and notes; *Baker v. Wheeler*, 24 Am. Dec. 66; *Wilcox v. Wilcox*, 13 Allen, 352.

Messrs. METCALFE & METCALFE, for appellees.

There being nothing in the record to show the question in controversy was adjudicated in the former suit, the judgment constitutes no bar by way of estoppel to this action.

"A judgment is conclusive only upon the matter which was directly in issue upon the former trial." *Herman's Law of Estoppel*, pages 183 and 184.

In the partition suit claimed as a bar to this suit for rents the appellee was sued as an individual, and in this case she sues as an administratrix.

Judgments, as a general rule, conclude the parties only in the character in which they sue or are sued, and therefore a judgment for or against an administrator, assignee or trustee, as such, does not ordinarily preclude him in an action affecting his own proper person from disputing the matters decided, or *vice versa*. *Bigelow on Estoppel*, page 65, and note, with authorities.

WILKIN, J. For some years prior to February 10, 1884, appellant and his brother, appellee's intestate, were in partnership, their principal business being farming. They owned about one hundred acres of farm land which they cultivated; also a considerable amount of other property, notes, accounts, etc. On the death of John C., at the above mentioned date, appellant took possession of the joint effects, filed an inventory, etc., and on the 15th day of February, 1886, in answer to a citation issued at the instance of appellee, filed a report

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in the County Court of Madison County of his actings and doings as such surviving partner. This report was excepted to by appellee, because he failed to account for rents and profits of the land above mentioned, and the exception was sustained both in the County Court and on appeal to the Circuit Court. In the latter there was a trial by jury and judgment rendered against appellant for \$541.09, from which an appeal was prayed and allowed to this court.

The only question which we need consider is whether or not, under the facts proved, appellant could be called upon in this proceeding to account to the administratrix of his deceased partner for rents received, and the use of the real estate owned by them at the time the partner died.

Primarily this question is to be settled by determining whether or not the real estate was partnership property. Real estate becomes partnership property, as a general rule, when three things concur: First, it must have been purchased for partnership purposes; second, appropriated to such purposes; third, paid for by partnership funds. Parsons on Partnerships, Sec. 2, page 364.

The only evidence found in the entire record as to the ownership of this land is that introduced by appellee from a deposition of appellant, filed in a chancery proceeding for the assignment of dower and partition of premises, to be more fully noticed hereafter.

That evidence is as follows: "John C. Pepper and I owned the said lands in partnership. I own an undivided one-half of them yet, and at the time of his death he was the owner of the other one-half of said lands. He and I have owned and occupied the said lands from 1862 until the time of his death. At the time of John C. Pepper's death, he and I were equal owners of the said lands."

Henry Robinson swears that he sold them (the brothers) the land as administrator, but he does not state in what name it was purchased, how it was paid for or to whom it was conveyed. Appellee, and perhaps other witnesses, state that it was owned in partnership, and so does appellant. These, however, are but statements of conclusions, contradicted by the

facts sworn to by appellant, and in no way disproved. The evidence of appellant shows that they were tenants in common, each owning an undivided one-half.

It is true that it might have been so held and still be partnership property, but that could only be so when the proof established the three elements above mentioned. "But although it be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants or tenants in common." Parsons on Partnership, Sec. 2, page 365. Again, it is said whether real property shall become partnership stock or not, is a question of intention. *Hoxie v. Carr*, 1st Sumner, 188; *Fall River Whaling Co. v. Borden*, 10 Cush. 462.

While it appears from the evidence that the brothers used the land for the purpose of carrying on their partnership business of farming, there is no proof whatever of an intention that the land itself should be a part of the partnership stock. It is clear from the proof made by appellee that appellant at no time so considered or treated it. She introduced in evidence the inventory of partnership assets filed by them at the February term of the County Court of Madison County, 1884, sworn to by him as a true and correct inventory, in which no mention is made of lands. At the October term of the Circuit Court of said county, 1885, as she shows, he filed his bill to assign her dower and have partition made of these same lands, in which he alleges that they are held by himself, appellee, and others who inherited from the deceased brother, as tenants in common, and, as before stated, while he testified on that hearing as a conclusion, that they were held as partnership property, he clearly shows by the facts that they were not.

We are, however, unable to perceive how, under the rules of law, appellee can escape the binding force of the decree rendered in that proceeding as *res adjudicata* of the present controversy.

That portion of the bill filed in that case introduced in evidence in this by appellee, so far as it sets forth the title,

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is as follows: "Your orator further represents that, at the time of the death of said John C. Pepper, he and your orator were the owners in fee simple of the following described real estate: * * * Your orator is the owner of the undivided one-half of said premises in fee simple absolute as purchaser, and also of the one twenty-eighth part thereof subject to the dower right of the said Catherine Pepper, as heir of his said deceased brother; the said Catherine, widow, is the owner in fee of the undivided one-fourth part of said land and is entitled to dower in another undivided one-fourth thereof." After describing the interests of the other parties, from which it appears that they each take as heirs of the said John C., it is averred that the aforesaid is the only real estate owned by the parties in common.

Appellee filed her answer to that bill, admitting the death of John C. leaving her his widow and the heirs as therein stated, and that he was seized in fee of the land mentioned in the bill. A decree followed in which, among other things, the court found that at the time of his death the said John C. was the owner of the undivided one-half as co-tenant with the said Gabriel Pepper of the following described real estate, etc., describing the same lands here in question. The premises being reported not susceptible of division and appellee having filed her consent in writing they were sold free from her dower and the proceeds divided.

Appellee insists that that adjudication is no bar to this, because, as she says, the question of rents was not then adjudicated. The vital question upon which depended her right, as administratrix, to demand the rents, namely, was the land owned by the brothers as tenants in common, or was it partnership stock, was directly in issue and adjudicated, and the decree of the court pronounced upon it.

In other words, if the real estate was owned by appellant and his brother as tenants in common, so that upon his death the one-half descended to his widow and other heirs, thereby making them tenants in common with appellant, it must be conceded that any accounting by appellant for rents and

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profits should be as co-tenant and not as surviving partner, and with his co-tenants, the heirs of deceased, and not with his representatives. The manner in which they were held being decided in the chancery suit can not be re-tried in this. *Hanna v. Read*, 102 Ill. 596, 602; *Tilley v. Bridges*, 105 Ill. 336; *Hamilton v. Quimby*, 46 Ill. 90; *Wright v. Dunning*, 46 Ill. 271; *Hicks v. Chapin*, 67 Ill. 375. It is also insisted that inasmuch as appellee was then sued as the widow and heir of her husband, John C. Pepper, and is now claiming as his administratrix, the doctrine of *res adjudicata* does not apply.

The question then involved being the same as here raised, whether the lands in question should be treated as going to the heirs or representatives of the deceased partner, and, so far as the evidence shows, she, being the real party in interest in both cases, is barred, the real parties in interest being the same so far as her rights are involved. But we also hold that the decree in the partition proceeding was correct even on the theory that the lands were partnership property.

Notwithstanding the conflict of authority on the subject, it is the settled law of this country that the legal title of the partnership realty is held by the partners as tenants in common subject in equity to be used in settling the liabilities of the copartnership; that when the debts of the firm are paid, "all the incidents and qualities of real estate *revive*," and it will become subject to dower, and descend to the heir as in any other tenancy in common. *Freeman on Co-tenancy and Partition*, Sec. 118. "Therefore, in this country, when the firm has been dissolved, or when it is evident that it can no longer continue its business, real estate constituting part of its assets may be divided by compulsory partition if it be shown that such realty will not be required to satisfy any liabilities of the copartnership." *Ib.*, Sec. 443, and cases cited in Note 3. The correctness of this doctrine is clearly recognized in *Strong et al. v. Lord et al.*, 107 Ill. 25. See also *Parsons on Partnerships*, 272 and 273; *Lang's heirs v. Waring*, 25 Ala. 625; *Shearer v. Shearer*, 98 Miss. 107; *Scruggs v. Blair*, 44 Miss. 406.

It is conceded here that the personal assets of the firm

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largely exceeded its liabilities. Appellee proves herself, by the introduction in evidence of the former report of appellant as surviving partner, that she has received a considerable sum of money after payment of the partnership debts. Therefore, on the proof made, the widow and heirs of John C. Pepper, upon his death, had the right to have the one hundred acres of land treated as real estate, and were entitled to an assignment of dower and partition thereof at once. Which being true, all the rents, issues and profits of the same passed to the heir and not to the administratrix.

We find nothing, either in our statute or the common law (of which the statute is but declaratory), which gives the administratrix of the deceased partner, under the evidence in this case, any right to demand of the surviving partner the rents and profits of this land.

Finding no theory of the evidence on which the judgment below can be sustained, we shall not prolong this opinion by an examination of the points made on the instruction.

Reversed and remanded.

ILLINOIS & ST. LOUIS RAILROAD & COAL COMPANY
V.
JOHN BEAIRD ET AL.

Carriers—Discrimination in Rates—Difference in Distance—Common Law Rules—Defective Declaration.

1. The common law imposes no duty upon common carriers to charge a higher rate for transporting goods a longer distance than like goods a shorter distance. But at common law such carriers are not permitted to charge extortionate rates.

2. In the case presented, it is *held*: That the declaration does not sustain the recovery, there being no averment of unjust discrimination nor that the rates charged plaintiffs were extortionate.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. AMOS WATTS, Judge, presiding.

Messrs. KOERNER & HORNER, for appellant.

The facts in this case can only be claimed to make a case of unjust discrimination, if distance alone is to be considered in determining whether a charge is just or not. But such is not the case. Distance is frequently subordinated to other consideration and must be. All facts bearing upon the particular question must be inquired into. *Houston & Texas R. R. v. Rust*, 9 A. & E. R. R. Cases, 123, Supreme Court, Texas; *Crouch v. R. R. Co.*, 2 C. & K. 789; *Parker v. G. W. R. R.*, 11 C. B. 545; *Gaston v. R. R.*, 101 E. C. L. 112; *Rogan v. Aiken*, 9 A. & E. R. R. Cases, 201; *Oxlade v. N. E. R'y*, 3d Jur. N. S. 637.

In *Ransome v. Eastern Connecticut R. R.*, 1 New & Mac. 63, in which it is said that "in determining whether a railroad company has given undue preference to a particular person, the court may look at the fair interests of the company itself and entertain such questions as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton per mile than smaller quantities, or for shorter distances, so as to derive equal profits to itself." See also *Hill v. St. L., A. & T. H. R. R. Co.*, 11 Ill. App. 258.

Mr. EDWARD L. THOMAS, for appellees.

The defendant admitted that the charge was same for greater distance as for shorter distances for like services, and by its superintendent that commissioners' rates were proportionally just, but claimed that operatives at a greater distance could not compete, if such proportionate charges were maintained.

This court and the Supreme Court have clearly and distinctly declared the case made out by this record to be one of unjust discrimination.

This court in the case of the *St. L., A. & T. H. R. R. Co. v. Hill*, 14 Ill. App. 579, says at page 585: "In the case of the *Chicago & Alton Road v. The People*, the doctrine of

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the common law as to prohibited discriminations was broadly stated, and it was held to apply as between different communities or *localities*, as well as between different individuals of the same town, and to include the case of *the same or a greater charge* for the shorter of two given distances, the shorter distance being a part of the greater distance; and it would seem the rules necessarily include this, as it is mathematically true both that the whole includes the part, and that the part is not equal to the whole." See C. & A. R. R. Co. v. People, 67 Ill. 11.

GREEN, P. J. Appellees brought suit in case against appellant in the court below and at the February Term, A. D. 1886, the cause was tried by the court without a jury, and resulted in a finding and judgment for plaintiffs for \$1 550 and costs of suit, and defendant thereupon took this appeal. Plaintiffs' amended declaration, upon which the cause proceeded to trial, was in substance that John Beaird and Charles Schroeder, late partners under the firm name of Beaird & Company, complained of the Illinois & St. Louis Railroad and Coal Company: for, that the said defendant in February, 1880, was a railroad corporation, operating a railroad and branches extending from the City of Belleville, Illinois, to the bank of the Mississippi River, opposite the City of St. Louis, Missouri, to a point commonly known as the Pittsburg Dyke, and defendant had a branch or switch extending from its main track in said City of Belleville, in a northerly direction, into the land of one Becherer, and that along the line of said switch and branch and along the main track of said railroad, there were twenty coal mines connected with the main line of the railroad by switches; that the railroad company every day received a large number of cars of coal from said mines and transported said coal over said branches and switches, and over its main line to said Pittsburg Dyke; that defendant collected, as hire for transportation of such coal from the persons operating said pit, the sum of two and one-half cents per bushel for each bushel so transported.

Plaintiffs further aver that at said time, and on each and

every day from said time to the commencement of this suit, the plaintiffs were operating two coal mines situated on the line of said road; that on each day defendant received coal for transportation on its switch connected with its main track to be transported to said Pittsburg Dyke, altogether receiving from the plaintiffs during said time 5,000,000 bushels of coal, and for so transporting said coal to the Pittsburg Dyke charged the plaintiffs two and one-half cents a bushel for every bushel of coal transported; and that the coal transported from the Becherer mines was the same class of freight transported in the same manner, in the same direction and to the same place as the said coal transported by defendant from the coal mines of the plaintiffs. The plaintiffs charged that the coal hauled for the owners of the Becherer was transported by defendant a distance of sixteen miles, and that the coal hauled by the defendant for the plaintiffs was hauled a distance of only eight miles; and that the defendant collected the same sum from the plaintiffs as they collected from the owners of the Becherer mines, each one being charged two and one-half cents a bushel, to the plaintiffs' damage of \$5,000.

The averments in this declaration, relied on by the pleader as sufficient to charge defendant with an injury to plaintiffs, recoverable in this action, are that defendant charged and collected from operators of coal banks located on its road, the same price for transporting coal from their mines over its road sixteen miles, that it charged plaintiffs for like transportation of coal from their mines for a distance of eight miles. This suit is not brought under the statute, but at common law, and it will be observed, there is no averment that the discrimination was unjust or injured the plaintiffs, nor is the rate charged and collected from them by the defendant for transportation averred or proved to have been an extortionate rate.

At common law, no duty is imposed upon common carriers to charge a greater rate or price for transporting goods a longer distance, than for a lesser distance, for like transportation of like kind of goods over their lines. Hence no action would lie at common law against such carriers for failing to

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charge and collect a greater rate for such greater distances, but common carriers are not permitted, at common law, to charge shippers extortionate rates. From what has been said it follows that no cause of action was averred and proved by plaintiffs for which they had a right to recover. Hence the finding and judgment of the Circuit Court is erroneous and must be reversed.

Reversed and remanded.

JOSEPH MILLER
V.
OHIO & MISSISSIPPI RAILWAY COMPANY.

Personal Injuries—Negligence—Fellow-Servants—Engineer and Laborer on Construction Train—Practice—Direction to find for Defendant.

1. A laborer upon a construction train and the engineer are fellow-servants. Such laborer can not, therefore, recover from the master for a personal injury caused by the negligence of the engineer where the competency of the latter is not in issue.

2. Where the plaintiff's evidence, with all proper inferences of fact to be drawn therefrom, is insufficient to support a verdict for him, the court may properly direct a verdict for the defendant.

[Opinion filed October 15, 1887.]

IN ERROR to the Circuit Court of Richland County; the Hon. WILLIAM C. JONES, Judge, presiding.

This action was brought by the plaintiff in error to recover damages for personal injuries, received by him while in the employ of the railway company. The declaration consists of a single count and contains substantially the averments following: That plaintiff was in the employ of said railroad company as a laborer on its track, in making repairs on said track, but in no way connected with the management and operation of defendant's cars on said track; that plaintiff was

working under the direction of Elmer Hanover, who was then in the employ of defendant as a boss of extra section hands to work on track, repairing, etc.; that while so engaged as such laborer on said track, plaintiff was ordered by said section boss, under whom he was working, to go upon one of the dirt cars of said defendant, connected with a construction train then and there standing upon said railway track, and clear out the dirt, sand and gravel in said car connected with said train, and that to said train was attached a locomotive for the purpose of moving said train of cars, which said locomotive was under the direction and management of one Childs as engine driver and engineer; that while plaintiff was on said car removing the dirt, sand and cinders from said car under direction of said section boss, the engineer of said train started the train without giving any signal, starting the train with a sudden jerk which threw plaintiff over the end of the car on which he was so working, and from which he was thrown upon the track of said defendant, and a following car attached to said train; plaintiff, without any negligence or carelessness on his part, was run over and so crushed and injured as to lose his left hand and left leg; and that by reason of the recklessness and carelessness of said engine driver, plaintiff sustained damages to the amount of \$10,000.

The general issue was pleaded and a trial had, when, at the conclusion of plaintiff's evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant, which was done and the plaintiff sued out this writ of error.

It appears from the evidence that the plaintiff below commenced work for the defendant in April, 1886, and continued in its employ until October of that year, when he was injured by falling off a car and being run over by the car following. He was employed as one of an extra gang of laborers to work upon the road whenever needed, and doing any kind of labor required in keeping the road-bed and track in order. Sometimes he would be engaged in surfacing the track, and at other times in assisting in loading sand and gravel upon cars at the pit and unloading them when moved to the desired place upon

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the line of the road. On the day before his injury he went with the construction train to the gravel pit and having loaded the cars, the train ran back to Olney, bringing the laborers with it, where it laid over night, and the next morning again taking the laborers on board, ran to the place on the road where it was desired to unload the cars and commenced to unload them. The plaintiff assisted in unloading the flat cars composing a part of the train, and the dump cars, not so operating as to completely clear themselves of the sand, the plaintiff, with others, was directed by his boss to get upon the dump cars and loosen up the sand so the car would discharge itself. He did so, and standing at the end of the car, struck his shovel into the sand to loosen it, and while in the act of striking the second blow the train, without warning, was suddenly started by the engineer and the plaintiff was thrown upon the track between the cars, and the car following ran over him, seriously and permanently injuring him.

Messrs. ALLEN & FRITCHEY, for plaintiff in error.

Motions to instruct the jury to find for defendant are in the nature of demurrers to evidence. They admit not only all the testimony proves, but all it tends to prove. To authorize the court to take a case from the jury the facts must be undisputed. *Frazier v. Howe*, 106 Ill. 563; *Penn. Coal Co. v. Conlon*, 101 Ill. 93, 106; *Park v. Ross*, 11 How. 362; *Doan v. Lockwood*, 115 Ill. 490; *Crowe v. People*, 92 Ill. 231.

The question whether one servant is in the same line of duty and so associated with another servant of the same master as to relieve the master from liability for an injury to one, resulting from the negligence of the other, is a question of fact for the jury and not a question of law for the court. *C. & N. W. R. R. Co. v. Moranda*, 108 Ill. 576; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57; *I. & St. L. R. R. Co. v. Morganstine*, 106 Ill. 216.

To exonerate a railway company from liability for an injury to one employe, through the gross negligence of another employe of the company, both must be engaged in the same line of duties. *T., W. & W. R. R. Co. v. O'Conner*, 77 Ill.

391; C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57.

A mere day laborer on the track of a railroad company may recover for an injury caused by the gross negligence of an engine driver, if free from negligence on his part. T., W. & W. R'y Co. v. O'Conner, 77 Ill. 391; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57.

A workman on the railroad track and an engineer on a locomotive are not in the same line of employment, and the former may recover of the company if injured through the negligence of the latter. P., Ft. W. & C. R'y Co. v. Powers, 74 Ill. 341; C. & N. W. R'y Co. v. Bliss, 6 Ill. App. 411; Campbell v. N. Y. Central R. R. Co., 35 How. R. p. 506; C. & St. P. R. R. Co. v. Lundstrum, 16th Neb. 254; S. C. 49 Am. Reps. 718.

Unless an employe, who receives an injury through the negligence of a co-employe, is so associated with another in his work as to be able to counsel and advise with him, the common master is liable for the injury. T., W. & W. R'y Co. v. O'Conner, 77 Ill. 391; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57; I. & St. L. R. R. Co. v. Morganstine, 106 Ill. 216; C. & N. W. R. R. Co. v. Moranda, 108 Ill. 576; C. & W. L. R. R. Co. v. Bingenheimer, 116 Ill. 226.

MESSRS. POLLARD & WERNER, for defendant in error.

PILLSBURY, J. The testimony introduced, together with all inferences of fact that the jury might legitimately draw therefrom, was sufficient in our opinion to sustain a finding that the plaintiff was injured through the negligence of the engineer in charge of the locomotive attached to the train, in suddenly starting it without warning, and that at the time the plaintiff was not guilty of contributory negligence. If these facts alone would entitle the plaintiff to recover, then the court erred in directing a finding for the defendant. The evidence of the plaintiff, however, clearly established the fact that he was engaged with the construction train as a laborer upon it, and it is insisted that he was a fellow-servant with all the other em-

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ployes of the defendant engaged in the loading or unloading the cars or in operating the train including the engineer and conductor.

The action of the court below was based upon this feature of the case, and if, from the evidence adduced, it so clearly appeared that the injury to the plaintiff was caused by the negligence of a fellow-servant that a finding based thereon, with all proper inferences of fact to be properly drawn therefrom that they were not fellow-servants, could not and would not be sustained by the courts, then, under the authority of *Simmons v. Chicago & Tomah R. R. Co.*, 110 Ill. 340, *Abend v. H. & T. R. R. Co.*, 111 Ill. 202, and *City of East St. Louis v. O'Flynn*, 119 Ill. 200, the court did but its simple duty in ruling as it did upon the motion to instruct the jury to find for defendant. We have most carefully examined the evidence contained in this record to ascertain if there was any fact or circumstance that would take this case out of the rule announced in the *Cox* case, 21 Ill. 23, the *Keefe* case, 47 Ill. 108, the *Britz* case, 72 Ill. 256, and the *Durkin* case, 76 Ill. 395, but are unable to distinguish this case from those cited in the principles there held applicable. In the cases referred to it was distinctly held that a laborer upon a construction train was a fellow-servant with the engineer and conductor, and that he could not recover for an injury received through their negligent acts where their competency was not in issue. These cases were referred to and the doctrine announced in them re-affirmed by the late case of *Abend v. T. H. & T. R. R. Co.*, *supra*, and applied to the case of a blacksmith in the employ of the defendant, who was required to go out upon the line as one of a crew of a wrecking train, and while upon the road was killed by the negligence of the engineer, who was also acting as conductor of the train. In this last case the trial court excluded the evidence from the jury, and this action was approved by the Supreme Court. If that case is to be treated as a binding authority upon the lower courts, and as such we are bound to consider it, it would seem to be a sufficient warrant for the action of the Circuit Court in the case at bar in directing a finding for the defendant. It is undisputed

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that the plaintiff below was, on the day he was injured, one of the laborers engaged upon the construction train, a work as much within the line of his duties as any other which he was called upon to perform. It is true he said he had nothing to do with the running of the train, and had no authority over the engineer or conductor, but these facts alike appeared in the cases cited, and were held not to have a controlling influence upon the question involved. Without further discussion we are constrained to hold that the action of the court was justified in view of the cases above cited, and we therefore affirm the judgment.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1887.

MATILDA BINGHAM
V.
SILAS BRUMBACK ET AL.

Practice—Motion to Dismiss Appeal—Renewal of—Adjournment of Court Below—Time of—Evidence.

1. Where a motion to dismiss the appeal has been overruled it can not afterward be renewed.

2. Upon a motion to dismiss the appeal on the ground that the transcript of the record was not filed in time in this court, the date of adjournment of the Circuit Court can not be shown by affidavit or certificate of the clerk of that court. The day of such adjournment can only be shown by an authenticated copy of the order of adjournment.

[Opinion filed January 16, 1887.]

APPEAL from the Circuit Court of Iroquois County; the
Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EVANS, for appellant.

Messrs. DOYLE, MORRIS & PIERSON, for appellee.

Per Curiam. At the present term and on the 16th day of December, 1886, a motion was entered herein by appellees to dismiss the appeal for the alleged reason that more than twenty days intervened between the final adjournment of the

March term, 1886, of the Circuit Court, at which term the judgment was rendered, and the convening of the May term, 1886, of this court, and that an authenticated copy of the record was not filed at said May term, or the time for so doing extended by the order of this court. See section 73 of Practice Act, as amended in 1879.

That motion we overruled, and for the reason the transcript of the record contained no adjourning order; and for aught that appeared therein the March term of the Circuit Court may not have been adjourned before Saturday, the 15th day of May.

The motion to dismiss the appeal has now been renewed, and with the motion the affidavit of one Pierson and the certificate of the clerk of the Circuit Court have been filed for the purpose of showing that said March term adjourned on the 2d day of April, 1886. Even if the affidavit and certificate were competent evidence to establish the day of adjournment, yet this motion now interposed should be ordered stricken from the files, for appellees have already had their day in court in the matter of the dismissal of the appeal for want of compliance with the provisions of the Practice Act; and if they did not file with their first motion evidence to show the day of adjournment, it was their own fault.

If the motion before us could be entertained, it would necessarily have to be overruled. The day of the adjournment of the term of the court could only be made known by an authenticated copy of the order of adjournment; and no such order is contained either in the original transcript of the record, or in the additional transcript filed with this motion. This additional transcript contains only a copy of the judgment of the court below and the order allowing the appeal. True, the clerk in his certificate to this transcript, states and certifies that the March term of the court adjourned on the 2d day of April, 1886, but such certificate can not be received as evidence of such fact. *Leach v. People*, 118 Ill. 157. The same rule will apply to the affidavit of Pierson.

The motion to dismiss the appeal is ordered to be stricken from the files.

Roseville Union Bank v. Gilbert.

ROSEVILLE UNION BANK
V.
FRANK P. GILBERT AND JOHN A. GORDON.

Negotiable Instruments—Action on Note—Extension—Payment—Surety Released.

In an action on a promissory note brought by a bank against the maker and surety, it is *held*: That the evidence sustains the plea of the surety, alleging an extension of the note by the cashier of the plaintiff without his consent; that the erasure of an indorsement and the failure of the plaintiff to produce its books on notice, required more satisfactory explanation than was given; that a payment of interest to its cashier, although in board, was, under the evidence, a payment to the plaintiff; and that the instructions, although not strictly accurate, could not have misled the jury.

[Opinion filed May 27, 1887.]

APPEAL from the Circuit Court of Warren County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. JAMES W. DAVIDSON and WILLIAM C. NORCROSS, for appellant.

To constitute a valid contract for an extension of time of payment on a promissory note so as to discharge a surety, three things at least are essential: *First*, there must be a valid contract entered into between the payee of the note and the principal maker to extend time; *Second*, the time of extension must be fixed and certain; and *Third*, there must be a new and valid consideration paid by the principal maker and accepted by the payee, and all of this must be without the consent of the surety. Jennings v. Fielder, 8 Ill. App. 252; Waters v. Simpson, 2 Gilm. 370; Grabfelder v. Welles, 10 Ill. App. 330; Galbraith v. Fullerton, 53 Ill. 126; Dodson v. Henderson, 113 Ill. 360; Booth v. Wiley, 102 Ill. 84; Gardner v. Watson, 14 Ill. 347; Woolford v. Dow, 34 Ill. 424.

The contract to extend must be so certain and binding be-

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tween the payee and principal maker as to postpone and hinder the remedies of the surety as well as the rights of payee. Galbraith v. Fullerton, 53 Ill. 126; Taylor v. Beck, 13 Ill. 376; Flynn v. Mudd, 27 Ill. 323; Moore v. Topliff, 107 Ill. 241; Waters v. Simpson, 2 Gilm. 370.

When an error of law has been committed it is the duty of the Appellate Court to reverse the case and remand it for trial, unless it clearly appears that such error could not have in any way injured appellant's rights on the former trial. I. C. R. R. v. Maffett, 67 Ill. 431; Volk v. Roche, 70 Ill. 297.

Messrs. KIRKPATRICK & ALEXANDER, for appellee.

WELCH, J. This was a suit brought by the Roseville Union Bank against Frank P. Gilbert and John A. Gordon on a promissory note, in which it was admitted on the trial that Gilbert was the principal maker of the note and Gordon was surety.

Gilbert made no defense but suffered a default. Gordon interposed a special plea alleging an extension of time of payment, in which it is alleged: "And that when the said note became due, to wit, on the 15th day of May, A. D. 1876, the plaintiff, at the request of the said Frank P. Gilbert and in consideration of the sum of \$2.08 $\frac{1}{2}$, being the interest in advance for thirty days, then and there agreed with the said Frank P. Gilbert to give, and did then and there give to him, further day of payment of the amount of said note, to wit, the 14th day of June, 1876, then next ensuing, without the knowledge or consent of him, the said John A. Gordon, by reason whereof the said John A. Gordon became discharged from all liability upon said note." Replication, trial, and verdict for Gordon on the plea. Judgment overruling motion for a new trial and judgment on verdict against Gilbert for \$450. This appeal is taken from the judgment overruling motion for a new trial. We are of the opinion the evidence sustains the plea. Gilbert states: "When the note was due I went to Pratt, who was cashier of plaintiff's bank, and asked him for an extension of thirty days on

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the note, paying interest on same. Told him I did not care to bother Gordon. My best recollection is that I paid the interest for an extension. At one time there was a board bill applied on the note; can't say certainly when, but one of the payments on the note was a board bill; other payments were indorsed in money." On cross-examination he says: "Have no recollection of making the payment on the note; can't bring any certain dates of payment." Gordon states that "he never consented to an extension of time on the note; some two or three months after the note fell due, and about the time Gilbert made an assignment, Seth F. Pratt called on me at my office and told me that he had agreed with Gilbert to extend the time of the note, and asked me if I considered myself bound for the note; I told him no; that he ought to have collected it long ago, and not let it lie so long. Pratt said: 'Well, I suppose I have given time on it, and that will release you.' I got a copy of the note from Pratt; indorsements on back, same then as now; the writing on copy and indorsements are all Seth Pratt's."

Copy of note and indorsements:

"\$250.

ROSEVILLE, Ill., Feb'y 12, 1876.

"Ninety days after date, we, or either of us, promise to pay to the order of the cashier of the Roseville Union Bank two hundred and fifty dollars, value received, payable at their banking office, with interest at ten per cent. per annum after maturity. Indorsements: 'Interest paid on the within for thirty days from May 15, 1876.' 'Received interest to July 15, 1876.' '8-14. Received on the within (\$10) ten dollars.'"

It further appears that notice in writing had been given plaintiff's bank to produce the books of the bank showing items of income of the bank for the months of May, June, July and August, 1876. Seth F. Pratt, the cashier, admitted in the presence and hearing of the jury, that he had received such notice; that he was unable to comply with the notice; that there was no book in the bank now that would show the items received during those months; that such a book had been kept, but could not be found; that it was lost or destroyed and

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that he could not produce it. Seth F. Pratt denies that he ever agreed to extend the time of the payment of the note or that he ever received interest in advance on the note; denies that he ever told Gordon that he had given time on the note, and that "that will release you;" he admits that he placed on the note the indorsement, "Interest paid on within for thirty days from May 15, 1876," and that it was erased by him. He says it was erased and included in one of the other indorsements. "I think the way it was, the first indorsement was in settlement for board and the last indorsement included both, as I was taking meals with Gilbert."

On re-cross examination he says that "the last indorsement does not include the first. It was the second one received interest to July 15th, \$4.40." If this statement is true, then the erasure of the first indorsement would have been made at the time of the entry of the second indorsement. The copy of the indorsements on the copy of the note furnished Gordon contains all the indorsements except the last, with no erasure of the first one. We hold that the evidence of Gilbert, Gordon and the indorsement, as originally made upon the note by the cashier, fully sustains the plea, and that the jury were fully justified in disregarding the evidence for the plaintiff. The erasure of the indorsement and the non-production of its books required a more satisfactory explanation than the record in this case discloses. The instructions for appellee, although not strictly accurate in stating the law, could not have misled the jury. In the view we take of the case it was the only verdict the jury could have rendered, to have given substantial justice between the parties. In such case, as held in *Creote v. Willey*, 83, Ill. 444, the verdict will not be set aside.

Substantial justice has been done. The judgment is affirmed.

Judgment affirmed.

On petition for a rehearing.

[Opinion filed December 16, 1887.]

Per Curiam. Two questions were presented to the jury

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under the plea. 1st. Was there an agreement between the principal in the note and the cashier of the appellant to extend the time of payment of the note from the time it became due, May 15, 1876, to June 15, 1876, without the consent of the security, the appellee? 2d. Was the interest paid by the principal in advance as a consideration for so doing?

It is not claimed that there is any instruction given by the court for the appellee injurious to appellant on the first proposition, and the jury having found from the evidence that there was such an agreement, we must regard it as rightfully sustained by the evidence.

As to the second question presented to the jury the appellant claims that there was no payment to it in a legal point of view; that the cashier received of the principal in the note the amount of the advanced interest in a board bill due from such cashier on his own account to the principal in the note, and that it did not receive the money. Instruction Nos. 3 and 4, given by the court at the request of appellee, are complained of as misleading to the jury on this issue. The third instruction told the jury in substance, if the cashier owed the principal in the note for board due or to become due, and by agreement between them the cashier undertook to pay the bank the interest agreed on in consideration of so much board and at or about the same time charged the principal with the amount of interest against so much board and entered the payment on the back of the note for the amount of the interest agreed, then this in law was a good payment of the interest. The fourth was about the same in substance.

Upon the question whether the cash was paid by the principal maker of the note on the particular interest for extension the evidence is somewhat conflicting, and if this were the turning point in the case the error in the instructions might be sufficient to cause reversal.

The main point upon which the case hinges is, did the cashier pay the appellant the money as he had agreed, or did he make the indorsement on the note of the interest received without accounting to the bank for it?

If the cashier actually paid such interest into the treasury

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of the bank, then the bank would be bound by the contract of extension the same as though the principal on the note had paid it in cash over the counter. Can there be any doubt that such was the case?

The first indorsement made on the note was as follows: "Interest paid on the within for thirty days from May 15, 1876." This was the indorsement upon which the extension was based, and if made before the 15th of June it showed for itself that there was interest paid in advance for the extension. The second indorsement is as follows: "7-15. Received Int. to July 15. \$4.40." The date of this by the figure would indicate 7th month, 15th day, or July 15th. The note had two other indorsements made in August, 1876, not necessary to refer to. Now the cashier, a witness for appellant, swears that the first indorsement was afterward erased and the amount of interest carried into the second indorsement, being \$2.20. He also swears that the amount of the first payment "was in settlement for board." The amount of money put into the first indorsement is still on the note and offered in evidence by the appellant, which is evidence produced by the appellant itself that the money was duly received and properly credited and is not in any way questioned as a good payment. If it was a good payment when credited in the second credit, it must have been when credited in the first. Nothing has happened to change the matter.

The erasement of the first credit was a suspicious circumstance, from which the jury might rightfully infer that the appellant was trying to obliterate damaging evidence. The cashier nowhere swears that he did not pay the money, shown by the credit first made, into the bank. The appellant also withheld its bank books from going in evidence, which would have shown how the record stood. Then on the point that the appellant received the money for the first interest from the cashier being clearly shown, it would be wholly immaterial whether the cashier got the cash from the principal maker of the note, or got its worth in his own board, by which he was procured to pay the money to the bank. In this state of the evidence the instructions could make no difference.

Petition for rehearing denied.

City of Elgin v. Picard.

CITY OF ELGIN

V.

L. B. PICARD.

Municipal Corporations—Street Vendors—License—Ordinance Strictly Construed—Soliciting Orders, not within.

1. Soliciting and taking orders for shirts without a license is not a violation of a city ordinance which prohibits selling, offering for sale, bartering or exchanging any goods, wares, merchandise or other articles of value without a license.

2. A city ordinance which is penal in character must be strictly construed.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Mr. F. W. JOSLYN, for appellant.

Messrs. BOTSFORD & WAYNE, for appellee.

LACEY, J. This suit was originally brought before a Justice of the Peace, by the appellant, to recover against the appellee for violating the city ordinance of the appellant against the sale of goods within the city by traveling salesmen without license. The cause in the Circuit Court was tried on an agreed state of facts by the court without a jury, and resulted in a finding by the court in favor of the appellee, and judgment against appellant for costs.

It appears from the agreed state of facts that the ordinance in question reads as follows: "Every person who shall sell, offer for sale, barter or exchange any goods, wares, merchandise or other article of value, traveling from place to place in, upon and along the streets of said city, shall be deemed a peddler. Every such person shall, before engaging in any way in said business within the City of Elgin, obtain a license as a

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peddler, under a penalty of \$25 for each offense, and every day or part of a day any such person shall engage in said business without a license shall be deemed a separate offense."

It was further agreed that "the defendant, as the agent and employe of the Castle Shirt Company, whose principal place of business was at Chicago, Illinois, on or about the 12th day of December, 1885, was in the City of Elgin, Illinois, going from place to place, soliciting and taking orders and taking measurements for gentlemen's shirts, and exhibiting a manufactured sample of the goods and styles of make-up. Thereupon, the facts coming to the knowledge of the city marshal, appellee was arrested and taken before the police magistrate, and fined \$25 for violation of said city ordinance.

"The orders and measures so taken by defendant were to be sent to Chicago and there filled by said company, which manufactured the goods, returned them to one Wadell, a jewelry merchant at Elgin, where parties giving their orders called, received their goods and paid their money to said Wadell, who acted as agent for said company, and receipted for such goods as such agent."

The City of Elgin was duly incorporated as a city under the general laws of the State of Illinois. The court below held that the said acts of the appellee did not constitute a violation of the city ordinance, and the refusal of the court to so hold is here assigned for error, and that is the main question to be decided here.

We are of the opinion that the Circuit Court held correctly as to the law. The stipulation is that appellee was only taking and soliciting orders. This is not equivalent to selling, offering for sale, bartering or exchanging any goods, wares, merchandise or other article for value. It does not appear that appellee had the power to close a bargain for the sale of the shirts. He could only take orders, which his principals might or might not fill, at their pleasure.

The taking of the orders does not come within any of the provisions of the ordinance. The ordinance in question is penal in its nature and must be strictly construed. *Spencer v. Whiting*, 28 N. W. R., 13 Iowa. It is not necessary to no-

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tice the question raised as to the legality of the arrest. Holding that the acts of appellee constituted no violation of the ordinance in question, it follows that the judgment of the court below must be affirmed.

Judgment affirmed.

MELINDA ANDERSON

V.

WILLIAM E. STONE.

Limited Partnership—Formation of—Cash Payment by Special Partner, Coupled with Agreement for its Application—Validity of—Sufficiency of Affidavit.

1. Upon the formation of a limited partnership to carry on a business already established, the limited partner may pay in money, coupled with a previous or simultaneous agreement that it shall be applied in payment of indebtedness for goods already in stock. Such an agreement is neither against public policy nor contrary to the provisions of the statute of this State.

2. In the case presented, this court holds that the affidavit by the general partner, attached to the certificate of partnership, wherein it is stated that the sum paid in by the special partner was actually paid in cash, was true in letter and spirit, although such payment was coupled with an agreement for its application. Such agreement does not render the special partner generally liable for the partnership debts.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Prior to December 20, 1883, G. W. H. Gilbert was a merchant, dealing in Peoria, Illinois, in hats, caps, "buck goods," furs and fur goods, having a stock of goods the cash value of which was \$10,450.04, incumbered by indebtedness to the amount of \$4,950.04 for the purchase price of the goods, leaving the value of the stock after paying the indebtedness

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\$5,500; and desiring to take a partner into the business he entered into a limited partnership with the appellant, as was supposed at the time in compliance with Chap. 84, entitled "Limited Partnership," Starr & C. Ill. Stat., p. 1564.

The certificate of limited partnership and affidavit annexed was, in substance, that they certified they had entered into a limited partnership under the name of G. W. H. Gilbert & Company; that the business of such partnership is dealing in hats, caps, "buck goods," furs and fur goods in the said County of Peoria; that said Gilbert is the general partner and appellant the special partner; that the appellant as such partner contributes the sum of \$2,750 to the common stock of the said partnership; that said partnership shall commence from and after the date of the instrument, December 20, 1883, and terminate on the 1st day of December, 1888, or upon mutual consent and notice. This certificate was duly signed by said Gilbert and appellant and duly acknowledged before Enoch P. Sloan by each of the parties on the same day, and said Gilbert duly made oath to said certificate before said Sloan on the same day, and stated that appellant, the special partner in the firm, "has actually and in good faith paid into the common fund of the said partnership the sum of twenty-seven hundred and fifty dollars (\$2,750) in cash." The legal notices and certificate of the printers were duly given and filed as the statute required. The new firm went into business under the articles of partnership at once, and continued in business till July, 1885, when, becoming embarrassed, the assets of the firm went into the hands of an assignee appointed by the County Court. The estate of the firm having been fully settled and only paying a portion of the indebtedness, this suit was brought by appellee on two promissory notes signed by the firm of G. W. H. Gilbert & Co., payable to appellee, the one dated February 2, 1885, for \$1,000, payable in ninety days, and the other dated February 18, 1885, for \$500, payable in sixty days. The cause was tried by the court without a jury and judgment rendered by it against the defendants, G. W. H. Gilbert and appellant, for the sum of \$729.20, being the balance due on the notes. The pleas were general

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issue, and an agreement that all defenses might be given in under the general issue. The defense was made that under the articles of agreement and the provisions of the statute the appellant was not generally liable to pay the said claims. That she had never taken anything out of the firm and was only liable for the amount she had put into it. But the court disregarded the defense and rendered a general judgment against her for the above sum. From this judgment this appeal is taken.

The appellee put in evidence the agreement of partnership as follows:

“Dated December 20, 1883.

“The partnership, to commence on this date and continue until December 1, 1888. First party, Gilbert, puts into the partnership his stock of goods, book accounts, bills receivable, store fixtures, apparatus, etc., as set forth in ‘Schedule A’ hereto attached and made a part hereof, valued at \$5,500, after deducting bills payable assumed by said firm. Second party pays in \$2,750 in cash.

“It is agreed, that said firm shall assume the business debts of said party of the first part, which are mentioned in the schedule hereto attached and marked ‘Schedule B,’ which is hereby made a part of this agreement, and said money paid into said partnership shall be used in paying said indebtedness, so far as it will do so.

“The first party shall receive two-thirds and second party one-third of profits, and losses be borne in the same way, except liability of second party limited to \$2,750. That there be yearly settlements, commencing February 1, 1885. That first party may draw \$1,200 per annum, but not to exceed \$100 in any one month. Second party may draw \$600 per annum, but not exceed \$50 in any one month; and profits in excess of \$1,800 per annum shall remain in the firm and be divided on final settlement.

“First party shall have the general supervision of the business, purchase of all goods, signing of all checks, and special management of fur department.

“Second party may, at her own expense, place in said store

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a person, whom she shall select, who shall have special charge of the hat, cap, glove and furnishings department, and general supervision of the books and accounts of said firm, and of the entire business in the absence of said party of the first part."

Messrs. GEORGE B. FOSTER and D. F. RAUM, for appellant.

Messrs. STEVENS, LEE & HORTON, for appellee.

The statute requires that at the time of filing the original certificate of partnership, an affidavit of the general partner shall also be filed, stating that the amount specified in the certificate to have been contributed by the special partner has been actually and in good faith contributed and applied to the same. Starr & C. Stat., Sec. 7, p. 1565.

And if any false statement is made in the certificate of partnership, or the affidavit of the general partner, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners. Ib. 8, p. 1566.

The courts allow no disregard of the provisions of these statutes that may prejudice the rights of creditors. Durant v. Abendroth, 69 N. Y. 148; Van Ingen v. Whitman, 62 N. Y. 513; Argall v. Smith, 3 Den. 435; Haggarty v. Foster, 103 Mass. 17; Pierce v. Bryant, 5 Allen, 91; Coffin's Appeal, 106 Pa. St. 280.

Where the affidavit of the general partner shows a contribution of money by the special partner, the contribution of any other commodity does not satisfy the statute. Havillard v. Chase, 33 Barb. 284.

Knowledge on the part of appellee that appellant claimed to be a special partner, does not affect him, if the requirements of the statute were not complied with. Andrews v. Schott, 10 Pa. St. 47, 55.

LACEY, J. The main point of objection raised to the validity of the partnership of the appellant and G. W. H. Gilbert is, that it appears that the \$2,750, paid in by appellant, was not

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paid in cash, but was actually paid in liquidation of Gilbert's debts, due by him on account of the goods then in his stock which was by him then put into the new firm, and that being the case, the affidavit of G. W. H. Gilbert, attached to the certificate of partnership filed in the County Clerk's office, was false, and thereby each member became "liable for all the engagements thereof as general partners," as provided by the statute.

The first inquiry will be, was the money, \$2,750, paid in by appellant in cash, or was it goods she put into the firm, or was it inadequate for any reason?

It is claimed under the authority of *Met. Nat. Bank v. Serrett*, 97 N. Y. 320, that a payment coupled with an antecedent agreement obliging the partnership to a specified use of the money, is not a payment in cash. Other cases are cited by appellant. In the case of *Andrews v. Schott*, 10 Pa. St. 47, one Harris put \$10,000 into the firm as a special partner and subsequently another partner was taken into the firm and a new certificate of special partnership issued, showing that Harris had contributed \$15,000 to the common stock of the firm. The first amount, \$10,000, contributed by Harris, was in cash, and remained there untouched by Harris, as a part of the capital, at the time the partnership was renewed or changed. Harris claimed that sum (\$10,000) should be considered good payment to the new firm, but the court held all the assets of the first firm are pledged to the debts of that firm, and the entire assets may not be sufficient to pay its debts; that, inasmuch as the first payment was liable to pay the debts of that firm, nothing was paid to the second firm.

In the case of *Pierce v. Bryant*, 5 Allen, 91, it was held, payment in promissory notes was payment in cash. The court held that this would not be a substantial compliance with the provision of the statute. In *Havillard v. Chase*, 39 Barb. 284, it was held that a payment in goods is not equivalent to payment in cash. The court say that "to allow it would be to sanction and encourage fraud." The same was held in *Van Ingen v. Whitman*, 62 N. Y. 531. In the case of the *Met. Nat. Bank v. Serrett*, *supra*, where the remark was made that

“a payment coupled with an antecedent agreement obliging the partnership to a specified use of the money is not a payment in cash,” it was made with reference to the facts in that case and was *dictum*, the point not being necessarily involved in the question decided. The facts were that the party who became the special partner was the owner of the stocks of goods, and wanting to close up on account of age and let the business go into other hands, entered into partnership with other parties, becoming a special partner by paying \$40,000 into the new firm and then immediately selling to the new firm his stock of goods for \$40,000, which was paid over to him and the new firm had the goods and he had the \$40,000. Though the transaction was very suspicious, the court upheld it on the facts as a genuine transaction, holding there was not sufficient proof to show that the sale of the goods was pre-arranged prior to the money being paid into the new firm by the special partner.

It will be borne in mind in considering those decisions that the statutes of New York, Pennsylvania and Massachusetts allow the proposed special partner to put nothing into the firm for his interest except *cash*. Hence any circumvention by which a party desiring to become a special partner accomplishes it by paying in his interest, in the proposed firm, in anything save cash, is a fraud on the statute and contrary to the general policy of the law. Such a transaction could not be allowed to stand. And the court, even in the latter case, says: “There is nothing in the letter or policy of the Limited Partnership Act to prevent the change from a general partnership into a limited one. The practical convenience of such a proceeding in many cases, is manifest.” What, in substance, was done in the case at bar? G. W. H. Gilbert owned a stock of goods of the value of \$10,450, with which he wants to continue business, or with \$8,250 of it. If he had as much as \$2,750 of cash put into his firm he could pay enough of the old firm’s debts which the goods were pledged to pay, to enable him to pay up the remaining indebtedness and go on with the business. The \$2,750 would, by taking in a special partner, go to pay up old debts, and the special partner could not

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withdraw this capital. The remaining goods, after deducting the \$8,250, would be \$2,200. just equal to the remaining debts. The new firm could pay those debts out of the goods, and therefore took them and assumed the debts—a far more praiseworthy and honest transaction than to have bought the goods of Gilbert, leaving the old creditors with nothing but Gilbert's individual responsibility for their security. Why did the Court of Appeals of New York intimate that an undertaking made in advance to use the money put in by the proposed special partner to pay for goods owned by such proposed partner was equivalent to an agreement to put in the goods without such contract? It is obvious—it was doing indirectly what could not be done directly. It was a fraud on the law, actual and intended.

We can not think that an agreement in advance to use the cash so put in to buy goods in the general market or of any particular firm for the use of the new firm in its business, or even to pay off debts and incumbrances on the stock of goods already in the firm, would vitiate the transaction on the ground that actual cash was not put into the proposed firm by the proposed special partner. Suppose a chattel mortgage due to a third party had been executed by Gilbert on the goods in question for \$2,750 and the agreement had been that the money proposed to be put into the special partnership should be used to pay off such mortgage, could such transaction be construed into one and the same as though appellee had actually put in goods directly? It seems to us that it could not. The title to the goods was never in appellant until she became possessed of her interest as a partner in the firm assets, the entire amount of which was \$8,250. She did not put this interest into the firm. She acquired it by the money she put in, which was afterward used to pay off incumbrances on the goods. If she did not put in goods she paid in money, although coupled with a previous or simultaneous agreement that it should be applied in a specified direction. Unless such stipulation rendered the transaction void, as being against public policy and contrary to the provisions of the statute, Gilbert's affidavit was literally and substantially true.

We will next consider what effect such cotemporaneous agreement could have on the transaction. Is there anything, in the statute or policy of the law to prohibit the general and special partners, in their articles of co-partnership, from providing for the application of the cash to be paid in by the special partner in such a manner as to forward and be consistent with the best interest and lawful purposes of the proposed firm, as well as the rights of future creditors? By the statute of New York and the other States mentioned, nothing but cash was allowed to be put into the proposed firm by the special partner; goods were excluded; yet the court in *Met. Nat. Bank v. Serrett*, *supra*, said: "There is nothing in the letter and spirit of the Limited Partnership Act to prevent the change of a general partnership into a limited one." If that be so as to that State, much more should it be so in this State where the statute expressly authorizes the putting in of goods in lieu of cash by the special partner. Gilbert in this case did not propose to become a special partner, but to remain generally liable for the new as well as the old debts, and there was nothing in the policy of the law to prohibit it. It would be a more favorable arrangement for the future creditors of the new firm as well as the creditors of the old. Gilbert found himself in possession of a large stock of goods incumbered by a considerable debt which he equitably should and did recognize and, an opportunity offering, entered into the contract of co-partnership in question.

The limited partnership then formed received the full value in goods for all assumed liability.

The future creditors commenced dealing with the limited partnership on most favorable terms, as it had only about \$2,200 debts, and to offset this indebtedness it had the same amount of goods, and a capital over of \$8,250. We can see no objection to such a plan of procedure being adopted in its incipency by the members of the new firm to be carried out when the firm is organized. The articles of agreement provided for assuming the old debts by the limited partnership. For doing this it received goods in compensation. This part of the agreement is not complained of. The old debts of Gil-

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bert by the agreement became the debts of the new firm and they must be paid. It is not claimed that the new firm could not have lawfully applied the money put in by the special partner, if there had been no pre-existing agreement to that effect, to the payment of the old debts so assumed by the firm. Even with the agreement, as made, the partners might have changed the application of the money paid in by appellee to other purposes after the partnership was formed. It were better for future creditors to have the old debts paid at once and the new firm free from debt. No harm could come to the general public from the course pursued. Debts are always dangerous to a greater or less degree, to any business, and the future creditors would be benefited in having them paid.

It does not follow in every case where the money of the proposed special partner is paid in with an agreement for its application by the terms of the articles of partnership that the payment will be deemed illegal. It will only be so in cases where some policy of the statute or law is contravened, or where the statute is attempted to be evaded, by fraud and circumlocution. But a previous agreement to appropriate the money to be paid in, not violating any of the above principles, will not be regarded in such a light as to vitiate the payment of the money into the special partnership by the special partner as a payment of cash under the provisions of the statute, nor will such agreement to appropriate such money for the legitimate purposes of the firm, have the effect to render the affidavit of the general partner, swearing to cash payment, false, within the meaning of the statute, with the consequence of making the special partner generally liable for all the debts. It will be seen by the terms of the articles of agreement of the special partnership, that the application of the money to be paid in was not a condition precedent to its actual payment into the treasury, nor did it render the articles of partnership void in case the money was not applied according to such agreement.

The money was actually paid in for the purposes of the business of the new firm, was so used, and, as we have shown,

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the agreement as to its application was not in any way harmful or against the spirit or letter of the statute.

In the general formation of partnerships it is of common occurrence in the articles of partnership to provide for the purchase of the assets of the firm, create debts and provide for their payment after such partnership is formed, and limit and control them, and determine out of what fund they shall be paid. The articles of partnership in the case at bar provide for the acquiring the assets and the creation of the debt in consequence, and determine in what manner a portion of such obligation should be paid, to wit, out of the fund contributed by the special partner. We are unable to determine what principle of law or portion of the statute on "Limited Partnership" is violated by such an arrangement. And no act is done that would be detrimental to the interest of the public or future creditors. The ordinary business man would understand, as the statute does not forbid, that associations could be formed in this way.

We therefore find that the affidavit attached to the certificate of partnership, in which it is stated that appellant had actually paid in cash the amount of \$2,750 into the fund of the partnership, was true in letter and spirit.

If the statute is to be upheld it must have a fair and reasonable construction by the courts, otherwise it would be substantially nullified by a course of narrow, illiberal and technical rulings. The Limited Partnership Act is a beneficial law; it encourages trade, and enables the active business man of small means to obtain capital with which to engage in business, from those who are willing to risk a limited sum, but unwilling to incur general liability.

No fraud was intended by either appellant or Gilbert, either to evade the law or to defraud future creditors of the proposed firm.

The appellee contracted the obligations sued on with full knowledge of the fact that appellant was only a limited partner, and did not expect at the time to hold appellant personally liable for his debt. It would be doing her great injustice to hold her liable as a general partner. The point is made by

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appellee that the proof fails to show that the \$2,750 was actually paid in by appellant prior to the time of filing the certificate of partnership, and the making the affidavit by Gilbert. We have examined the evidence, and deem it sufficient on that point.

The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

ROBERT JOHNSON
V.
FIRST NATIONAL BANK OF MORRISON.

Negotiable Paper—Note—Collateral Agreement—Dependent Covenants—Notice to Assignee—Failure of Consideration—Pleas—Demurrer.

1. In an action upon a promissory note, a plea to the effect that the note was given for seed-oats, in connection with an agreement that it was not to be paid until the crop matured and the payee had sold a certain quantity of the oats raised, at a stipulated price; that the plaintiff, as assignee, had notice of such agreement, and that such sale has not been made, constitutes a good defense.

2. In the case presented, it is *held*: That the promise, by the payee, to sell the oats raised, and of the maker to pay the note, are dependent covenants; that the payment of the note depends upon the sale according to agreement; and that certain pleas were defective.

[Opinion filed December 9, 1887.]

IN ERROR to the Circuit Court of Whiteside County; the Hon J. V. EUSTACE, Judge, presiding.

Messrs. MANAHAN & WARD, and J. & J. DINSMOOR, for plaintiff in error.

Mr. J. D. ANDREWS, for defendant in error.

A set-off or counter-claim is not an equity that attaches to

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a note affecting purchasers with notice. Benj. Chalmers' Dig. Art. 134, explanation 3; 2 Daniel's Neg. Inst. 401; Favorite v. Lord, 35 Ill. 142.

Breach of an executory agreement which constituted the consideration of a note, does not constitute a failure of consideration. Gage v. Lewis, 68 Ill. 604, 617; Willetts v. Burgess, 34 Ill. 494; Davis v. McCready, 17 N. Y. 230; Patten v. Gleason, 106 Mass. 439; Daniel's Neg. Inst. Sec. 790; Condrey v. West, 11 Ill. 146, 151.

An executory agreement which constitutes only a part of the consideration on one side for the promise of the other party, and a breach of which can be compensated for in damages, is an independent covenant, and its breach is not a part failure of consideration. 2 Parsons on Contracts, 528-9 n. 7; Nelson v. Oren, 41 Ill. 18; White v. Gillman, 43 Ill. 502; Gage v. Lewis, 68 Ill. 615; Tompkins v. Elliott, 5 Wend. 496.

Contemporaneous agreements must be between the same parties and no others, or else they are independent and can have no effect upon each other. 2 Parsons' Notes and Bills pp. 536, 537; Jackson v. McKeney, 3 Wend. 233; Isham v. Morgan, 23 Am. R. 361.

To rob one of character of *bona fide* holder, he must have notice of something that defeats the title of his assignor at the time of the assignment. 1 Daniel's Neg. Inst. 789; Benj. Chalmers' Dig., Art. 85, 88; 2 Parsons' Bills & N. 500, 501.

Fraud or illegality does not avoid a negotiable security except when a statute declares it void or says no action can be had upon the same. Shipley v. Carroll, 45 Ill. 285; Clarke v. Johnson, 54 Ill. 296; Town of Eagle v. Kohn, 84 Ill. 292-6.

LACEY, J. This was a suit based on a promissory note in form assigned to appellee, given by appellants to one C. P. Fox, in the sum of \$500, due on or before the first of January, 1886, dated March 11, 1885, with interest. There were no pleas except the special pleas, the plea of the general issue having been withdrawn.

The appellee demurred to each and all of the special pleas

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and the demurrer was sustained by the court. The appellant abiding his pleas, the court gave judgments on the note against appellant.

From this judgment appeal is taken and the action of the court questioned as to its correctness. We are of the opinion that the second special plea was good. It was a plea to the declaration except \$25, showing a partial failure of consideration to the amount of \$475.

By the plea it is averred that the consideration of the note was the purchase, by appellant, of and from a pretended association calling itself the Ohio, Indiana and Michigan Bohemian Oat Association, for the introduction and sale of Bohemian oats, of fifty bushels of such oats, through C. P. Fox, payee of said note, who at the time of purchase was the agent of said pretended association, and sold said oats to the defendant as such agent; that at the time it was understood and agreed then and there, by and between the said pretended association and the appellant, that the said oats were purchased by defendant for seed; and as part of the consideration for the giving of the said note by appellant, the said association, through its agent, agreed with appellant in writing at the time of making the said note, and as a part of the same transaction, to sell for appellant out of the crop to be raised by him in 1885, from such seed, 100 bushels of said oats at \$10 per bushel, before December 1, 1885, and appellant should not be called upon to pay any part of said note until and unless such sale for defendant of 100 bushels of oats, at \$10 per bushel, should have been first made by said association, and although appellant, in 1885, raised from the said oats over 100 bushels of like oats, and has at all times since the harvest of 1885 had said 100 bushels of said crop ready for sale by said association, and at divers times since the said harvest and prior to December 1, 1885, has requested said association to sell said 100 bushels of said oats for appellant, yet the association have wholly failed to sell for defendant any part of the said 100 bushels of oats; and appellant avers that said fifty bushels of said oats were at no time worth to exceed the sum of \$25. And the appellant avers that the said appellee received the said note with full

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notice and knowledge of said undertaking of said association to sell said 100 bushels of the said oats for appellant, and that said note was not to be paid by appellant until and unless such sale was first made by said association for appellant, closing with a verification.

It will be noticed that this note, which is only a note in form, and the written agreement, constituted one contract as between the appellant and Fox, and as between the former and any assignee with notice of the agreement. It is not in reality a note when the writings are taken together and read as one contract.

It amounted to an agreement that the appellant should take the fifty bushels of oats at \$500 and sow the same, and when the new crop was secured 100 bushels of them should be sold by the pretended association for \$1,000. The sale was in substance guaranteed. Nothing was to be paid until all this was accomplished. It was a very roseate agreement on the part of the appellant.

Without any risk, except the possible failure of the crop, the appellant had an almost certain prospect to get enough out of the transaction to pay him for the original seed, \$500 in cash besides, and his entire crop of oats, save the 100 bushels sold. He little suspected the intended fraud on the part of the oily-tongued agent bearing the significant name of Fox.

He could not see that Fox intended to transfer his note to an innocent holder and then refuse to fulfill his part of the agreement, which it may be reasonable to suppose would be hard to enforce either against the "*Ohio, Indiana and Michigan Bohemian Oat Association*," or against the agent Fox.

The very favorableness of the contract should have been sufficient to put appellant on his guard, but it seems, like many others, he failed to see through the fraudulent plans of Fox.

In regard to the plea, if the substance of it is regarded, it would appear that, as appellee had notice of the agreement and that the note was not to be paid unless the 100 bushels of oats were first sold, it stood in the shoes of Fox, and the plea would operate against it the same as it would have done against Fox if he had brought the suit. If appellee knew of

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the agreement to sell the 100 bushels of oats before the note could be due, it must have known that it simply held an assigned contract, the payment of the note depending on a certain other condition which, if not fulfilled by Fox or the Oats Company, it must fulfill itself in order to enable it to collect the note. It was a condition precedent, made so by the agreement that if the 100 bushels of oats were not sold for \$1,000, then the note as a part of the agreement was to be null.

In other words, the entire consideration failed. This is not like the cases cited by the appellee where the consideration of a note simply rests on the covenants and agreement of a third party to do or perform some act, where the agreement does not make the consideration of the note invalid in case it is not performed.

The covenant of Fox or the Bohemian Oat Company, which for all the purposes of this case are one and the same, with appellant, promising to sell the 100 bushels of the oats, and the payment of the note, were dependent covenants. That is, the payment of the note depended on the sale according to agreement. If the sale never took place the consideration of the note failed.

In 2 Parsons, 529: n. r., cited by appellee's counsel, it is laid down as a rule of law, that "when a covenant goes only to a part of the consideration on both sides, and a breach of the covenant may be compensated in damages, it is an *independent* covenant."

Now, by virtue of this agreement, the failure to sell the 100 bushels of oats, as the agreement required, could not be compensated in damages; the agreement to pay the note itself was to fail. The plea, however, admits that the note was good as to \$25, the value of the oats furnished for appellant by Fox. This was voluntary and the appellant would be bound by it though it were unnecessary to make the admission. It is not necessary that the appellee should have known that there was a breach of contract to sell the oats; he knew that the payment of his note depended upon the fulfillment of the contract, and that was sufficient and was all he need know. Fox was simply the agent of the Oats Company,

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and, as such, the note was taken in his name and neither he, nor his assignee with notice, can have a better right than the principal.

The third special plea fails to aver notice to the appellee of the existence of the outside agreement. All the other pleas are also bad as pleas of fraud and circumvention. The fraud and circumvention charged in them simply goes to the consideration and not to the execution of the notes.

The averments in the pleas simply show that the appellant knowingly executed the note, but that he did so because he believed in the promises and inducements held out to him by Fox, of great gain to accrue to him by entering into the bargain and the raising of the oats, and may be in one plea he did not fully understand the legal effect of the note and agreement signed separately as they were. An innocent purchaser of a promissory note is not to be affected in his rights by any such consideration as this. In order to be good such plea should show that by some trick or device the signature of the note was procured when in fact the maker supposed he was signing something else, not a note. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

THE NORTHWESTERN BENEVOLENT AND MUTUAL AID
ASSOCIATION OF ILLINOIS
V.
BARBARA WANNER.

Life Insurance—Mutual Benefit Association—Certificate, not Affected by Subsequent By-Law—Suicide—Action of Covenant—Sufficiency of Declaration.

1. The contract of insurance between a mutual benefit association and one of its members will be as fully protected as if made with a stranger. The association can not, without the assent of such member, impose any new condition affecting the contract to his injury. It can not, by subsequent by-law, forfeit any of his rights under the contract.

24	357
42	101
24	357
72	474
73	338
24	357
81	567
24	357
87	324
24	357
109	1349

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2. In the case presented, it is *held*: That the certificate in question was not affected by a subsequent by-law exempting the defendant from liability in cases of suicide; that an action in covenant will lie on the policy; and that the declaration is sufficient.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

The appellant was duly organized under an act of the Legislature of the State of Illinois, entitled "An Act for the Organization and Management of Corporations, etc., for Indemnity to Members thereof." Approved June 18, 1883. The organization of the appellant took place April 29, 1884. This action brought by the appellee was in *covenant*, and was based on a second grade certificate, set out in the declaration, in substance, as follows: "This certificate, issued by appellant, witnesseth, that Joseph Wanner is entitled to all the rights and privileges of and in the Northwestern Benevolent and Mutual Aid Association of Illinois, and to participate in the beneficiary or relief fund of the association to the amount of \$2,500, which sum, or such part thereof as may be collected as specified in the constitution and by-laws of the association, shall, within sixty days after proofs of death, be paid to his wife, Barbara Wanner." The certificate is issued upon the condition that the said Joseph Wanner shall comply with the constitution and by-laws of the association, and that the statements in the application for this certificate are true. On the back of the certificate was indorsed the constitution and by-laws of the association. The declaration averred, in legal phraseology, in substance, as follows: That Joseph Wanner, named in the certificate, was the husband of appellee, named therein; that said Joseph Wanner died at Peoria, about the 23d day of March, 1886, of which death the appellant then and there had notice. And appellee averred that, in accordance with by-law No. 3, on the reverse side of certificate, deed or policy, the membership in said association was divided into four grades, as follows: membership, between the ages of six-

teen and thirty, grade one; between the ages of thirty and forty, grade two; between forty and fifty, grade three; between fifty and sixty, grade four; and that members were entitled to certificates of membership in the following order; grade one, certificates of \$3,000; grade two, certificates of \$2,500; grade three, certificates of \$2,000; and grade four, certificates of \$1,500. And the amount of any of the above certificates shall be paid in full, according to the terms of said certificate, and provided the relief fund shall be sufficient to make such payment. If the said relief fund is not sufficient to make payment in full; an amount shall be paid on the certificate equal to the amount collected on the assessment made on such certificate, less the cost of collection and disbursement, as specified in section 7 in the by-laws of appellant association.

And the appellee averred that the assessment provided for by the by-laws of said association for said grade to class "A" to which, by the terms of the said certificate, the said Joseph Wanner belonged, to be collected by appellant, to pay said loss on said certificate to the appellee, would amount to more than the said full sum of \$2,500, in addition to all the costs and charges for collection, disbursements, or otherwise, under the rules of the said association. The declaration avers, that though it was the duty of appellant to collect said sum and pay it to appellee, or pay over any money in the treasury, etc., yet, although the said Joseph Wanner in his lifetime, and appellee, his wife, and others named in the certificate, have kept and performed all things in the said certificate contained to be performed, the appellant, though often requested, has not paid the appellee the said \$2,500, or any part thereof, but refuses so to do, etc., closing with demanding \$5,000 damages.

The appellant filed its plea to the declaration, in which it set up that the certificate was issued to Joseph Wanner, on the condition that he should comply with the constitution and by-laws of the association; and the appellant further averred that at the time of issuing the certificate it had full power to ordain and establish by-laws for its government, and to alter and

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amend the same at its pleasure, and it further averred in said plea that on January 2, 1885, it duly adopted and passed a by-law in which it was provided as follows: "Sec. 17. Death executed by the hand, act or procurement of the member, whether voluntary or involuntary, sane or insane at the time, is a risk not assumed by the association," of the adoption of which said by-law the said Joseph Wanner had notice and acquiesced therein from thence to the time of his death. The plea then recites the by-law in force at the time the certificate was given in regard to the collection of the assessments, and it has no other means except as collected by assessments; and avers that six members of appellant committed suicide, and Wanner was benefited by not having to pay their certificates. And appellant then averred that the said Joseph Wanner did on the 25th of March, 1886, etc., commit suicide, and that his death occurred by his own hand, act and procurement, by means whereof the certificate sued on was null and void, and appellant not liable to pay the same or any part thereof. And another plea that, by immoral practices, Joseph Wanner did impair his health, to wit: commit suicide, etc.

The appellee demurred to the said two pleas, and the court sustained the demurrer thereto to each of said pleas, and the appellant abiding its pleas, the court gave judgment against appellant for \$2,450 and costs, from which judgment this appeal is taken, and the sustaining of the demurrer to said pleas and rendering of the said judgment is assigned for error, as well as not carrying the demurrer back to the declaration and sustaining it to the declaration.

Mr. LAWRENCE HARMON, for appellant.

Mr. M. N. GISH, for appellee.

LACEY, J. We are of the opinion that the pleas are not good and that the court below did not err in sustaining a demurrer to them. It appears at the time Joseph Wanner took the certificate of insurance, there was no such by-laws as was afterward passed and numbered 17, and it is, there-

fore, no bar to the recovery of appellee if the insured should die by his own hand, act or procurement, sane or insane. But it is contended by counsel for appellant that Joseph Wanner was a member of the society as well as a contractor for insurance or benefit, and that by his certificate he took it on the condition that he should comply with the constitution and by-laws of the association, and the appellant having the power to make by-laws, might make and change them so as to make the contract of insurance contain important conditions and limitations touching appellant's liability it did not contain before. We can not agree with this view of the law; undoubtedly the appellant might change its by-laws and even pass No. 17 but it could not do so in a manner to give the subsequent by-law a retroactive effect as to contracts and obligations entered in before that time, unless it could be clearly seen that such power was reserved. Nothing of the kind appears in the certificate in question. Joseph Wanner, according to the certificate, must comply with the by-laws, but what by-laws? Evidently the by-laws then in existence, but none to be passed affecting the vital principles of his contract.

It might well be that he would be bound by any by law subsequently passed that only referred to mere regulations not changing his contract in substance. It is the general policy of all our constitutions and laws, that no law shall be passed invalidating a contract existing at the time of its passage.

All implications are also indulged in against any subsequently passed law without express provision being even intended to refer to existing contracts. By-law No. 17 provides that, "death occurring by the hand, act or procurement of the member, whether voluntary or involuntary, sane or insane at the time, is not assumed by this association;" but this by-law does not, except by mere implication, refer to the holders of certificates already issued. We ought not to construe this language so as to refer back and affect certificates then existing, but rather so as to affect those issued thereafter. The words "not assumed by this association" should be construed to read "will not be hereafter." Thus construed the by-law would not cover the case of the certificate here involved. The fact that James

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Wanner had notice of its passage could not enlarge its meaning.

We can not distinguish the appellant from any other mutual insurance company. In all mutual insurance the shareholder participates in the benefits and profits, and is a recognized member of the company. Joseph Wanner had no more favorable position than this in the appellant company. The contract of insurance between a member of a mutual insurance company and the company has always been held to be as binding as though made with a stranger, with no more right to change it on the part of the insurer without the consent of the insured. In such contract the assured is acting for himself and in no part as the representative of the company. In *Insurance Co. v. Connor*, 17 Pa. St. (5 Harris) 136, it is said: "A corporator in a mutual insurance company, like a stranger, may enter in a contract of insurance with it and his rights under the contract will be as fully protected as those of a stranger. The remedies existing at the time of the contract for enforcing it against him, are all that can be resorted to. The company has no right without his assent to impose any new conditions, affecting the contract to his injury, or by a by-law passed after the making of the contract forfeit his rights under it." "The rights of a party insured stands entirely free from such control." See also *Middlesex Turnpike Co. v. Swan*, 10 Mass. 384; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361.

As to the other averment we need only remark that the fact that Joseph Wanner stayed in the company and was not called on for any assessments for the representatives of those who died by their own hand, would not invalidate his contract or change it. Those who died might have been holders of certificates issued subsequently to the passage of by-law No. 17; nor could it make any difference in any event.

As to the other plea, we need only remark that the impairment of Joseph Wanner's health by act of suicide is not one of the immoral practices within the meaning of the certificate covenanted against by the assured.

Another point is made that the demurrer should have been carried back and sustained to the declaration. We do not

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think this point is well taken. It was the duty of the appellant to proceed to collect these assessments upon receipt of the notice of the death of the holder of the certificate and pay the amount collected over within sixty days to appellee.

This the declaration avers it utterly refused to do, or to even try to collect any of the money, or to ascertain, by giving notice, how much could be collected. It appears that appellant denies all liability. Its covenants were broken in every particular.

But, it is said, suit in covenant could not be maintained for the reason that it can not be known whether \$2,500 could be collected out of its members besides the costs attending the collection and paying over the money to appellee. But the declaration shows that the assessment provided for by the by-laws and rules of the said association would more than make up the above amounts. We think that the presumption is, that enough would have been paid to satisfy in full the appellee's claim as against appellant, who utterly refused to make any effort. Again, every day's delay might endanger and lessen the amount that could be collected, if prompt action were had. We think the declaration is sufficient and that an action in covenant will lie. It might remain to the defendant to plead and show that the amount that could be collected under the certificate and by-laws would not amount to the sum of \$2,450. This they utterly refused to do, but stood by the pleas in question. There are some decisions to the contrary, but we can not hold otherwise than that covenant will lie on this certificate under the facts as averred. For an interesting opinion see one delivered by the late United States District Judge, S. H. Great, in *Lueder's Exrs. v. Hartford Life and Annuity Co.*, 12 Fed. Rep. 71.

The case of *Covenant Mut. B. Ass'n of Illinois v. Sears*, 114 Ill. 108, is not in conflict. It was there simply held that a court of equity had jurisdiction, not that a court of law would not have. The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

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MOLINE PLOW COMPANY
V.
LEWIS ANDERSON.

Personal Injuries—Action by Employee for Damages—Conflict of Evidence—Instructions—Defective Declaration—Arrest of Judgment.

1. The court may properly refuse to give an instruction which states an abstract proposition of law.

2. Where the declaration states a cause of action, though ambiguously and improperly, a general verdict will cure the defect therein.

3. In an action by an employee against his employer to recover damages for a personal injury, it is *held*: That the questions of fact involved must be considered as settled in favor of the plaintiff by the verdict of the jury, the evidence being conflicting; that there was no error in giving and refusing instructions; and that there was no manifest error in overruling the motion in arrest of judgment.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. IRA O. WILKINSON and EUGENE LEWIS, for appellant.

Messrs. WILLIAM JACKSON and M. M. STURGEON, for appellee.

BAKER, J. This case was before us on a former appeal. See *Moline Plow Co. v. Anderson*, 19 Ill. App. 417. A sufficient statement of the facts will be found in the opinion there reported. The last trial seems to have been in substantial conformity with the views of this court, as expressed in the opinion indicated. The judgment now at bar is for \$1,600 damages.

Upon the trial the evidence was quite conflicting, and we must regard the controverted questions of fact as settled by the verdict of the jury in favor of appellee.

The contention of appellee was and is, that he was in the

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employment of appellant as a grinder of plows, and that, as such, it was a part of his duty to his employer to assist his fellow servants in moving new grindstones, when needed, from the outside to the inside of the grinding shop; that his compensation for such labor was included in the price paid for the piece-work done by him, and that Olof Erickson, foreman of the grinding shop, had control and direction of the grinders, both in the shop and in the work of moving the grindstones. The decided weight of the evidence tends to establish this view of the case, and that the labor of bringing in new grindstones, to replace such as became worn out and unfit for use, was a part of the work of a grinder, and included in his employment. We think, therefore, that the objections urged against the 2d, 3d and 5th instructions, given at the instance of the appellee, are untenable, and that those instructions were necessary and proper, as they merely stated the law that was applicable to the case in the event the jury found the facts to be as claimed by appellee.

The 18th instruction offered by appellant was refused by the court, and there was no error in so doing. If appellee, while engaged in rolling the grindstone, was the servant of the company, and if Erickson had authority from the company to direct and control such operation, then it is wholly immaterial that the corporation did not give special authority to their foreman to order the employes to use the particular stick in question.

The 19th instruction stated an abstract principle of law, and its tendency would have been to draw the attention of the jury from the real questions at issue, and it was properly refused.

The sixteen instructions that were asked by appellant and given by the trial court, presented the law of the case to the jury as favorably and fully for appellant as could reasonably have been desired.

Exception is also taken to the action of the court in overruling the motion in arrest of judgment. The grounds urged for the motion are, that the declaration does not allege that Erickson, the foreman, had authority to command appellee to help take in the grindstone, and that the declaration does not aver that it is the duty of appellee to help take in the grind-

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stone when ordered by Erickson. The declaration is not as specific in these respects as it should have been. It does, however, allege, among other things, that the plaintiff was an employe of the defendant, that Erickson was foreman in the department in which plaintiff was employed, and had authority from the defendant to command the plaintiff and his fellow-servants in said department, and that plaintiff, along with other employes, was required by said Erickson to roll one of said grindstones, etc., etc. The duty of the defendant to provide a suitable stick or piece of timber for the work, and its breach of duty in that respect, are also fully stated in the declaration.

We do not regard this as a case where the declaration fails to show that the plaintiff has any cause of action whatever, but merely as a case in which the cause of action is defectively and inaccurately stated. The rule is, that if a cause of action be stated, though ambiguously and imperfectly, a general verdict will cure the defect. Where the statements in a pleading are insufficient in themselves, and yet are of such a character as to force upon the mind of the court the conclusion that all must have been proved upon the trial which should have been stated in the pleading, then the defective pleading is aided by intendment after verdict, and the court may render judgment. 1 Chit. Pl. 712; Wann v. Harris, 2 Gil. 307; Smith v. Curry, 16 Ill. 147; Commercial Insurance Co. v. Treasury Bank, 61 Ill. 482; Heiman v. Schroeder, 74 Ill. 158.

In our opinion there was no manifest error in overruling the motion in arrest of judgment.

We may remark, in passing, that it appears, both from the evidence and from the instructions of the court, and more especially from several that were given at the instance of appellant, that the case was tried by both parties and submitted to the jury upon the theory and understanding that the declaration contained the specific averments, the want of which was afterward made the basis of the motion in arrest. So it would seem, that, as matter of fact, no possible hardship was occasioned or actual injustice done, by overruling the motion.

Finding no error in the record which should reverse, the judgment is affirmed.

Affirmed.

Gifford v. Wilkins.

GEORGE E. GIFFORD

V.

CHARLES WILKINS, ADMINISTRATOR.

Action on Note by Administrator—Plea of Set-off—Evidence—Competency of Wife as Witness—Statute of Limitations—Instructions.

In an action by an administrator on a note, it is *held*: That the wife of the defendant is incompetent to prove a contract between him and the deceased for the boarding of the latter's parents, although she did the work and kept the defendant's accounts; that the evidence does not sustain the contract alleged in the plea of set-off; and that an instruction touching the Statute of Limitations, if erroneous, could not have injured the defendant.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Kendall County; the Hon. C. W. UPTON, Judge, presiding.

Mr. BENJ. F. HERRINGTON, for appellant.

Messrs. M. O. SOUTHWORTH and N. J. ALDRICH, for appellee.

LACEY, J. This was a suit in assumpsit brought by appellee, who is the administrator of his wife, formerly Jane Spanswick, on a note for \$600, given by appellant to her in her maiden name, dated January 28, 1881, due in two years after date with interest at eight per cent. per annum.

The defense interposed by the appellant was that by way of the common counts in a plea of set-off in the sum of \$800, and for board, lodging and attendance by appellant, who was the brother-in-law of deceased, furnished at her request to Timothy and Priscilla Spanswick, the father and mother of deceased and also of the wife of appellant. Reply of the Statute of Limitations was interposed to this plea by appellee, and also failure of consideration and general replication. The cause was tried by a jury resulting in a verdict for appellee for \$671.55. Motion for new trial was made by appellant and

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overruled by the court and judgment rendered on the verdict from which judgment this appeal is taken.

We have examined the evidence and carefully considered it and are of the opinion that the jury were fully justified in finding that it was entirely insufficient to sustain the plea of set-off in regard to the agreement by Mrs. Wilkins to pay appellant for keeping the old people, further than the amount he received from the old man Spanswick himself.

There was no error committed by the court in refusing to allow the wife of the appellant to testify in his behalf. The statute forbids it except in certain specified cases, and this does not come within any exception provided for in the statute. It is insisted in substance that as the wife was the husband's agent in keeping his account, that is, in doing the work in taking care of her father and mother, that therefore she was agent in making the contract with Mrs. Wilkins in regard to boarding the old people and could testify to what deceased said as to the contract she made in relation to paying for keeping them. We do not understand that such facts would constitute her such an agent as to authorize her to testify to the arrangement, if any, between her husband and Mrs. Wilkins in regard to the boarding of Mr. Spanswick and wife and this is what we suppose appellant desired to prove by his wife. If it was simply what was done by her as the agent of her husband for the old folks, it should have been so stated, so the court could have passed on the question.

It is complained that the court erred in giving the appellee's sixth instruction, which told the jury that appellant could not "recover any sum (on his plea of set-off) which has accrued to him more than five years prior to the commencement of this suit," when by force of the statute in case of death of the debtor the time is extended one year.

We do not think the point is well taken. Even if the instruction was erroneous, the appellant could not have been harmed thereby. The suit could not have been commenced later than June, 1886. Now the appellant's claim began to accrue, as he insists, December 13, 1880. Five years would bring it to December 13, 1885. The suit was commenced

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April 30, 1886, less than five years and five months after the date of the commencement of appellant's claim. Hence not five months of it was cut off by the statute according to the instruction. Mrs. Gifford, the main witness for appellant, testifies that Mrs. Wilkins told her, in regard to paying appellant for keeping her father and mother, that "the note was given by him so he could hold that much money and he was to pay her interest on that till father's money was gone; after that it was to be different." The old people had about \$600. When this money was gone Mrs. Wilkins was to commence paying. The \$600, if allowed to be charged to appellant before his claim would commence to run against Mr. Wilkins, would much more than pay for the first five months' board. The balance, if allowed at all, could not be cut out by the instruction under the five years' limitation act, because it accrued within five years if at all.

If the appellant was entitled to a set-off for the full amount for the keeping of the old people for the entire time, if at all, then the jury defeated him on the merits of the claim, as it allowed him nothing, though under the sixth of plaintiff's instructions he would have been entitled to nearly all the claim, if he could sustain it by the evidence.

In any event the sixth given instruction for appellant could do no harm. Perceiving no error in the record the judgment is affirmed.

Judgment affirmed.

JACOB SCHEIK ET AL.

V.

TRUSTEES OF SCHOOLS.

Bond of School Treasurer—Action against Sureties—Receipt—Application of Payments—Commissions.

1. In an action against the sureties on a school treasurer's bond, it is held: That certain amounts objected to were properly included in the

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judgment; that the date of a certain receipt is not conclusive as to the time of payment; and that the liability of the principal was established by his receipt to the former treasurer.

2. Where a creditor makes no application of a payment, part of his indebtedness being secured and part unsecured, such payment may be applied to an unsecured indebtedness at the option of the creditor, or by implication of law.

[Opinion filed December 9, 1887.]

REMANDED from the Supreme Court.

Messrs. C. A. HILL and HALEY & O'CONNELL, for appellant.

Messrs. JAMES FRAKE and B. W. ELLIS, for appellees.

LACEY, J. This cause was appealed to the Supreme Court from a decision of this court reversing the judgment of the lower court without remanding, and upon appeal to and a hearing in the Supreme Court, the judgment of this court was reversed and the cause remanded back for further proceedings not inconsistent with the decision of that court. For the opinion of this court and the Supreme Court, see 16 Ill. App. 49, and 109 Ill. 579.

In passing upon the questions involved at the former hearing, as will be seen by an examination of the opinion, we only passed on the question of liability of the sureties on the School Treasurer's bond, and, determining there was no liability, we did not pass upon the question of its amount.

The Supreme Court having decided that there was liability, it now becomes our duty to pass upon the objections raised by appellants against the justice of a portion of the judgment.

The appellants are the sureties on the School Treasurer's bond of appellees; Philip Reitz, never having signed such bond, is not a party to the suit. Certain amounts having gone into and made up a part of the judgment recovered against appellants, are objected to as improper, to-wit:

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1. Item, \$185.20, charged by Reitz as commission on the building fund of District No. 7.

2. Item, in not crediting him with the McGlashan note of July 21, 1876, for \$72.50.

3. Item, in not crediting him with \$616.10 excess of loans over collections prior to the date of the bond in suit.

4. Item, in charging those securities with \$600 received by Reitz from Martin after his re-appointment, April 11, 1887, and also \$11.75 received by Reitz after such appointment.

As to the item of \$185.20 claimed to be due the treasurer for commissions, we can say we think there is evidence sufficient to justify the court in finding it was an afterthought on the part of Reitz, and that he made the charge just before he gave up the books, notwithstanding his evidence to the contrary.

The \$600 received by Reitz we will next notice. The evidence of Reitz shows that this was not received as of the date of the receipt, and hence the date of the receipt should not govern as to the time of its reception, and we think the court was justified in finding that the money was received before Reitz was re-appointed, and if not, the \$1,000 payment made by Reitz to his successor might be applied on this indebtedness of Reitz to appellees till it was extinguished, this amount being unsecured, at the option of appellees or by implication of law, and that the principle announced in *Trustees of Schools v. Smith*, 88 Ill. 181, is not authority against this being done. In the *Smith* case the entire claim was in a judgment, and it could not be regarded as two claims, one secured and the other unsecured. In this case there were two claims, one for \$611 unsecured, and the other a large sum, secured by Reitz's bond.

We are satisfied that the court was justified in finding, from the evidence, that there was no second McGlashan note.

As to the claim of \$616.10, loans over collections, we think the question of collections had little to do with the matter, as the receipt to Bock, the former treasurer, for notes and money to the amount of \$13,076.49, was sufficient to establish Reitz's liability, and his collections need not be taken into ac-

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count. He must show that amount remaining in his hands in some form, or how he disposed of it. *Trustees v. Smith, supra.* We find no material error committed on the part of the court against the appellants in the admission of evidence.

Finding the judgment substantially correct, the judgment of the court below is affirmed.

Judgment affirmed.

JESSE GITCHELL
V.
MOLLIE RYAN.

Negotiable Instruments—Action on Promissory Note—Forgery—Practice—Evidence—Expert Witnesses—Comparison of Signatures—Instructions.

1. In an action on a promissory note, the defense being that the note was forged by the plaintiff, it is *held*: That, in view of the special circumstances presented, the court should have allowed great latitude in the cross-examination of the plaintiff as a witness; that it was proper to ask her how often she had written the defendant's name, and whether she had offered to sell the note at a large discount; that evidence tending to impeach the consideration, although not admissible for that purpose under the pleadings, was admissible as tending to show that the defendant did not execute the note; that it was error to allow expert witnesses to compare the signature to the note with certain other signatures of the defendant, and then state their opinions as to the identity of the handwriting; and that there was no error in giving and refusing instructions.

2. Where proffered testimony tends to prove any of the issues on trial, it should not be excluded, even though it tends to establish a defense not interposed.

3. The genuineness of a signature can not be proved or disproved on the trial of a cause by comparing it with other signatures admitted to be genuine.

4. The trial court may properly refuse to give an instruction which is argumentative, and the substance of which is given in another instruction.

[Opinion filed December 9, 1887.]

Gitchell v. Ryan.

IN ERROR to the Circuit Court of Ogle County; the Hon. JOHN V. EUSTACE, Judge, presiding.

Mr. E. F. DUTCHER, for plaintiff in error.

Mr. J. H. CARTWRIGHT, for defendant in error.

BAKER, J. This suit was by Mollie Ryan, defendant in error, against Jesse Gitchell, plaintiff in error, on a promissory note for \$800, dated February 1, 1884. A plea was filed putting in issue the execution of the note. The finding of the jury and judgment of the court were in favor of defendant in error for \$983.10 damages.

Several errors were committed by the trial court in its rulings upon the admissibility of testimony.

Upon the cross-examination of defendant in error, the court sustained an objection to this question: "How often have you written Jesse Gitchell's name?" The claim of Gitchell was that the note was a forgery. Defendant in error was a graduate of a business college and an expert penman, and was being cross-examined after her examination in chief as a witness in her own behalf; she had already testified in positive terms that Gitchell signed the note in her presence and that no one else was present at the time and place this was done. In view of the defense that was being interposed to the suit, the fraud that was claimed, the interest of the witness in the result of the litigation, and of the circumstances surrounding the supposed signing of the instrument, we think a very great latitude of cross-examination should have been given plaintiff in error, and that it was manifestly erroneous to allow the objection to this question to prevail. Defendant in error was intimately acquainted with Gitchell and had received many letters from him, and if the fact was that she had written his name frequently, it would tend to prove her ability to counterfeit his handwriting and signature.

The court also refused to permit plaintiff in error to ask the same witness whether she had taken the note in controversy to Rockford and offered to sell it to a Mr. French at \$100 discount.

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It is a suspicious circumstance if unexplained, that one would offer to sell a note at so large a discount, and moreover, the fact sought to be established would have been in contradiction of statements she had made on the witness stand with reference to where the note had been kept from the time of its date. In our opinion the question should have been allowed.

Plaintiff in error denied the execution of the note and all the circumstances stated by defendant in error; but the court refused to permit him to testify whether or not, on the first day of February, 1884, or at any other time, he was indebted to Mollie Ryan. The ground upon which this evidence was excluded was, that there was no plea of want of consideration on file. The evidence was clearly not admissible, under the pleadings, for the purpose of impeaching the consideration of the note; but it was not sought to be introduced for that purpose and was expressly offered as tending to prove that Gitchell did not execute the note. It is improbable that any one would sign and deliver a promissory note for \$800 to a person to whom he was not and never had been indebted, and the fact in question would have been a circumstance tending, at least in some degree, to prove the plea that was on file. If proffered testimony tends to prove any of the issues on trial, it should not be excluded, even though it might also, in case proper plea had been filed, have been competent evidence in establishing a defense that was not interposed. There would have been no difficulty in instructing the jury to regard such testimony solely and only for the purposes for which it was offered and admitted. *Gridley v. Bingham*, 51 Ill. 153, is not an authority here in point; in that case the statements of the vendor made after sale were wholly incompetent as evidence against the vendee for any purpose and did not tend to prove any fact in issue; here the proffered testimony tended to prove the defense made by the pleadings.

The ruling of the court in the premises was erroneous.

On the trial of the case, George E. King, Stephen Pankhurst and Peter Hastings were called as experts by defendant in error, and shown the signature to the note in suit, and also the signatures to two affidavits made by defendants in error

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and on file in the cause, and asked to state whether the signatures to the two papers and the note were in the same handwriting. The court refused to admit this testimony. There was no error in this action of the court. The doctrine of this State is, that the genuineness of a signature can not be proved or disproved on the trial of a cause by comparing it with another signature admitted to be genuine. *Kernin v. Hill*, 37 Ill. 209; *Snow v. Wiggin*, 19 Ill. App. 542; *Jumpertz v. People*, 21 Ill. 375; *Melvin v. Hodges*, 71 Ill. 422; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

It was, however, manifest error to permit the two first mentioned of said witnesses to compare the signature to the note with the signatures of Gitchell in two autograph albums, and then, over the objections of defendant in error, state their opinions with reference to the identity of the handwriting of the several signatures.

In *Melvin v. Hodges*, above cited, it was held that on cross-examination, where the object is not to prove a signature by comparison, but merely to test the accuracy of the observation and memory of the witness, it is competent to show him a signature as to the genuineness of which there is no question, and examine him in respect to the genuineness of such signature. The witnesses Quinn, Ackerman, Custa Plantz and Rose and Ellen Gitchell, had all testified in chief that they were acquainted with the handwriting of defendant in error, and also, in terms more or less positive, that the signature of the note was not in his handwriting. Under the rule announced above the court properly permitted them to be cross-examined upon the papers "C" and "D," which had been admitted by defendant in error to be in his own writing.

The objections urged against the instructions given at the request of the plaintiff below are untenable.

There was no error in refusing the fourth instruction in the series asked by the defendant below; the substance of it was given in the sixth instruction, and, moreover, it was argumentative and otherwise objectionable.

It seems to us that the verdict of the jury was palpably

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against the weight of the evidence, but as the issue joined must be submitted to another jury, we refrain from discussing it.

For the errors indicated in this opinion, the judgment is reversed, and the cause remanded.

Reversed and remanded.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY

V.

E. W. FELTON, ADMINISTRATOR.

Railroads—Action for Damages for Causing Death of Passenger—Apparent Danger—False Signals—Negligence—Proximate Cause—Variance—Instructions.

1. In an action against a railroad company by an administrator to recover damages for causing the death of the plaintiff's intestate, while a passenger on one of the defendant's trains, it is *held*: That it was negligence on the part of the engineer to give false signals which induced the deceased to jump in the way of a snow-plow on another track, there being no danger of a collision; that the deceased was not guilty of contributory negligence in going upon the platform; that the proximate cause of his death was the negligence of the engineer; that there was no variance between the plaintiff's evidence and the declaration; and that there was no error in giving and refusing instructions.

2. The officers of a railroad undertake to have knowledge of all facts of which the diligence of good railroad men could have possessed them.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Will County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. THOMAS F. WITHROW, JAMES C. HUTCHINS and SNAPP & SNAPP, for appellant.

Assuming that the danger, which puts upon another the

alternative of a dangerous leap, rather than to remain at a certain peril, need not be a real danger, which becomes apparent, but simply an apparent danger—a danger which did not exist—the judgment in the court below is erroneous.

The deceased was not placed by the negligence of the defendant in such a situation as rendered a leap necessary.

The leading case is *Jones v. Boyce*, 1 Starkie, 189. This case was followed by the Supreme Court of the United States in *Stokes v. Saltonstall*, 13 Peters, 181.

In each of these cases, which are leading cases upon the subject, and upon which the rules, as announced in the text books, are based, the plaintiff was in a condition of real peril, which peril became apparent to him. We have examined quite a number of cases and find that in each case that condition also appeared. It may well be doubted whether the word “apparent,” as used in the statement of the rule, is not used in the sense of a thing which becomes evident rather than in the sense of a thing which is unreal. The fact that the rule is held to apply, notwithstanding the actual danger did not result, in any of the cases, does not militate against this.

The proper place for the passenger is in his seat, and a voluntary abandonment thereof subjects him, and not the carrier, to the responsibility for the consequences. *Pennsylvania Company v. Zebe*, 33 Pa. St. 318; S. C., 37 Pa. St. 420; *Stiles v. Atlantic & W. P. R. Co.*, 8 Am. & Eng. Ry. Cas. 195 (Geo.); *R. R. Co. v. Clemmons*, 8 Am. & Eng. Ry. Cas. 396 (Texas); *Little Rock & Ft. S. Ry. v. Miles*, 13 Am. & Eng. Ry. Cas. 10 (Ark.); *Ala. & Gt. S. Ry. v. Hawk*, 18 Am. & Eng. 194 (Ala.), citing with approval *Quinn v. I. C. R. R.*, 51 Ill. 495, also *Merrill v. Eastern R. R. Co.*, 139 Mass. 238; *P. & R. I. R. R. Co. v. Lane*, 83 Ill. 448; *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202; *I. C. R. R. Co. v. Slatton*, 54 Ill. 133; *Taylor v. D. O. & O. R. R. R. Co.*, 10 Ill. App. 311; *C. & N. W. Ry. Co. v. Scates*, 90 Ill. 586; *State v. Grand Trunk Ry. Co.*, 58 Me. 176.

There is no evidence tending to show what danger or whose danger the signal was intended to avert, simply that a

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passenger construed them as danger signals. The company had the legal right to sound these whistles, upon the assumption that Goodrich was inside the car. *I. C. R. R. Co. v. Green*, 81 Ill. 19; *Ky. Cent. R. Co. v. Thomas*, 79 Ken. 160.

The deceased was, under the evidence adduced, affirmatively guilty of a want of ordinary care, which contributed proximately to the injury which he received. *Railway Co. v. Jones*, 95 U. S. 439; *Doggett v. I. C. R. R. Co.*, 34 Iowa, 284; *Camden & A. R. R. Co. v. Hoosey*, 99 Pa. St. 492. *P. & R. I. R. R. Co. v. Lane*, 83 Ill. 448; *Quinn v. I. C. R. R. Co.*, 51 Ill. 495; *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202.

The defendants could not have foreseen by the aid of the known results of human experience or knowledge that the negligence alleged could have proximately contributed to the injury received.

Messrs. G. D. A. PARKS and C. W. BROWN, for appellee.

He who, by wrongful act, neglect or default produces a sudden appearance of danger, such as may be presumed to impress the mind of a person of ordinary intelligence and judgment with the belief that it was real, and thus impel him to take instantaneous measures of escape, is liable for the injuries that ensue in the same manner and to the same extent as if the danger actually existed. *T., W. & W. Ry. Co. v. Muthersbaugh*, 71 Ill. 572; *Wharton's Neg.*, Sec. 304; *Conlter v. Am. U. Ex. Co.*, 56 N. Y. 585; *Galena & C. U. R. R. Co. v. Yarwood*, 15 Ill. 471; *I. C. R. R. Co. v. Able*, 59 Ill. 131; *Ind. R. R. Co. v. Carr*, 35 Ind. 510; *Stokes v. Saltonstall*, 13 Pet. 191; *Schultz v. Chicago & N. W. Ry. Co.*, 44 Wis. 644-5; *Gumz, Adm'r v. C., St. P. & M. R. R. Co.*, 52 Wis. 672; *C. & A. R. R. Co. v. Becker*, 76 Ill. 25; *Lund v. Inhabitants, etc.*, 11 Cushing, 567; *Caswell v. B. & W. R. R. Co.*, 98 Mass. 204; *Trowley v. R. R. Co.*, 69 N. Y. 158; *Buell v. N. Y. C. R. R. Co.*, 31 N. Y. 318; *Iron Co. v. Mowery*, 36 Ohio, 418; *Southwestern R. R. v. Pault*, 24 Ga. 356; *Filer v. N. Y. C. & H. R. R. R.*, 68 N. Y. 124; *Am. Law Reg.*, Vol. 25, p. 620; *Baley v. Eastern R. R.*, 125 Mass. 63; *Sweeney v. R. R. Co.*, 10 Allen,

(Mass.) 376; Copley v. N. H. & N. R. R. Co., 136 Mass. 9; Warren v. Fitchburg R. R. Co., 8 Allen, 233; C., B. & Q. R. R. Co. v. Sykes, 96 Ill. 162, 175; T., W. & W. R. R. Co. v. Harmon, 47 Ill. 298, 307.

LACEY J. This was an action on the case by appellee against appellant to recover damage to the means of support to the children and next of kin of Luke H. Goodrich, deceased.

According to charges in the declaration the deceased was killed while being carried as a passenger on appellant's railroad to the city of Joliet, on the 20th day of March, 1881, through the negligence of the employes of the appellant. The facts and circumstances of the killing of the deceased are in substance, that between two and three o'clock on Sunday morning of March 20, 1881, deceased, in company with William Maltby, boarded the appellant's passenger train as a passenger, at Ottawa, Illinois, bound for Joliet, in Will County of the same State; that the passenger train was composed of two engines, a baggage car, regular passenger car and a sleeping car, and of the two railroad tracks of the appellant was on the north one, or on the left hand one if you face Joliet. It was storming violently at the time of the accident, and had been for several days, and the snow was drifting badly. The last stop of the train immediately before the stoppage at the place of the accident was at Morris, in Grundy County, about twenty miles west from Joliet.

Mr. Maltby and deceased were located in the passenger coach, on the north side, four or five feet from the hind end of the coach. At about five to seven miles from Morris, a short distance before reaching Minooka, the passenger train was stopped by a snowdrift. The deceased, Mr. Maltby and Mr. House went to the back end of the train and got onto the platform to look out at the snowdrift, and there being a solid snowdrift on the north side of the car, the three went to the other side of the car onto the steps.

Mr. House passed over to the other side and went down the steps on that side, and deceased went down the steps on the passenger car on the south side, and Mr. Maltby looked

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over to the back of Mr. Goodrich. Mr. House made the observation: "My God, gentlemen, the snow plow is coming into us." House then immediately turned around and went back into the car. Mr. Goodrich, the deceased, and Mr. Maltby remained, and could see the red light behind swinging and the exhaust distinctly, two exhaust fires coming out of the smoke stack of the approaching train, and apparently pretty close to the standing train, and the question was whether to jump off the train to save themselves or to remain on, and it had to be decided quickly. The decision was to jump, and Maltby and the deceased jumped, deceased first and Maltby immediately after. At that instant the heavy snow plow with its two engines, which turned out to be on the south track, rushed by, throwing Maltby beneath the car he was on, packing him in the snow, but injuring him seriously, and he got out and got back on the car, but the deceased was caught by the passing snow plow, and so seriously hurt from contact with it that he died the next Monday night or Tuesday morning in Joliet, on account of internal injuries received from his contact with the snow plow.

At Morris the passenger train switched from the south track to the north one for the purpose of letting the snow plow get on the south track, which it did, and immediately followed up the passenger train, all of which was known to the conductor of the passenger train. On account of the big curve in the railroad at the point just behind the passenger train where it came to a stop, and the light, it would naturally appear to Mr. Goodrich, deceased, at the time, as though the snow plow was coming on the same track with the passenger train, that is, immediately behind it.

The snow drift on the north side of the train being as high as the cars there was no way of getting off on that side. Just as the snow plow was approaching, one of the engines on the passenger train gave signals of danger by giving short, sharp quick signals, one following another right off, two, three or four. Nearly all the engineers and firemen and perhaps the brakemen, jumped from the cars and ran from their train across the track to escape the supposed impending collision.

The negligence averred in the declaration was the giving of the signals of danger on which deceased acted, and that the servants so negligently, ignorantly and unskillfully managed the said engines, and with such want of concert and knowledge between the servants of said appellants managing said respective trains, that the deceased was struck and killed as aforesaid, while in the exercise of due care.

The question is, were these signals of danger given by appellant's servants in order to warn the passengers of the danger of a supposed collision about immediately to take place? We think that there was ample evidence in the case from which the jury might so find. If so, we think that it was negligence in the engineer under the circumstances to give such signals, when, in fact, there was no danger of a collision, and the engineer who gave the signal should have known it. If this be so, then, was there any ground for the claim that deceased was guilty of contributory negligence in obeying the signals and making the leap? All the appearances corroborated the intelligence communicated by the signals, that there was danger. The approaching train appeared to deceased and others to be coming directly into the train on which they were riding.

What person under the circumstances would not have done the same as did the deceased? House did not, but he probably did not hear the danger signal until he had gone back into the car, when he had no time. The main cause relied on for reversal by appellants, is the charge of contributory negligence against the appellee. It is that the deceased left his seat in the passenger car and went out onto the platform, where he had no right to be, and in so doing was guilty of such negligence as to preclude recovery; for it is argued by appellant, if he had remained in the car he could not have jumped out in time to have been injured.

The I. C. R. Co. v. Green, 81 Ill. 19, is relied on as conclusive authority on this point, as well as other similar cases cited in the brief. But we think the cases cited are not applicable to the facts here. In those cases the injury was caused by deceased going into a more dangerous part of the

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car which proximately contributed to the injury. In this case the going out on the platform may have been a remote cause of the injury in the same sense as his being on the cars as a passenger was the cause. If he had not been on the cars he would not have been hurt. If he had not been on the platform he would not have received any injury if he had remained there. In itself it was not dangerous to be there, so the only proximate cause of the injury was the jump and the collision. It could not have been within the reasonable contemplation of deceased when he went on the platform that the snow plow would approach in an apparently so dangerous a manner, or that the engineer would give so false and exciting an alarm. If the danger had been real his position on the platform might have been most fortunate. He might have been able to have saved himself from the wreck which no doubt would have followed.

As the train was standing still, the deceased had no reasonable grounds to apprehend danger from going on the platform. Then, the being on the platform can not stand for the proximate or contributory cause of the injury. It was the peculiar surroundings brought about by negligence, in great part at least, by the servants of the appellant, that caused the injury, and not any negligence of the deceased. As illustrating this question of remote and proximate agency we cite C. & A. R. R. Co. v. Ewing, 72 Ill. 25.

The appellant is responsible for the acts of the engineer in giving false alarms. C., B. & Q. R. R. Co. v. Sykes, 96 Ill. 162; T., W. & W. R. W. Co. v. Harman, 47 Ill. 298; C., B. & Q. R. R. Co. v. Dickson, 63 Ill. 151; also Wesley City Coal Co. v. Healer, 84 Ill. 126. Had the engineer been in possession of the knowledge that the law holds him to, he could not have been deceived by appearances as he was deceived, and would not have given the false signals which he did. If he gave them wilfully it would be worse than inexcusable in any light it could be looked at. The jury may have thought it was wilful. No engineer was put on the stand to explain the matter, and one of the engineers, he who did not desert his engine, was in the court room at the time of the trial and was not called to the stand.

He may have been the one who gave the alarm signals and the fact, if he did so, that he remained on the train, would give color to the thought that he did it wilfully, though it may be with no intention to do harm. But certainly it would be negligence to alarm passengers under such circumstances. If the signals were given in good faith, believing there was danger, then good railroading required that he should have been in possession of such facts in regard to the circumstances as would have rendered such a mistake impossible.

The two trains started from Morris nearly together, the passenger train on which deceased took passage a few minutes ahead. It was in a dark, stormy night. It was essential that the conductor and engineer of each train should know on which track the other designed to or was running, in order to guard against accident. The rule of law is "that the officers of a railroad undertake to have a knowledge of all facts of which the diligence of good railroad men could have possessed them." Wharton on Negligence, Secs. 157, 158, 387 and 415; Warren v. Fitchburg R. R. Co., 8 Allen, 231.

If they do not have such knowledge they are held to be answerable the same as though they had it; as the law will conclusively presume they had it. If the engineer had either actual or constructive knowledge that the snow plow was on the south track it was negligence in him to blow the alarm whistle. He ought to have been acquainted with the curve in the track immediately west of his train and the tendency to optical illusion in reference to the following train appearing on the same track with his own. With such a knowledge it would have been impossible for a good railroad man to have made such a mistake.

On the trial the appellant made no effort to explain or rebut the strong proof of negligence offered by appellee, though one of the engineers was at hand. See C., B. & Q. R. R. Co. v. McLallen, 84 Ill. 109.

We find no error in the giving of appellee's instructions by the court, or in refusing those offered by appellant that were refused.

There was also no error in the court below refusing to ex-

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clude appellee's evidence on the grounds of variance between it and the declaration, or to instruct that there was a variance. As to the first count in the declaration no cause for variance is attempted to be shown and as to the second count no variance is claimed except the proof shows that the injuries were received while appellee was not on the cars, while the declaration charges it was received while a passenger on its train. It is true enough that when he received the injury he was off the train, but under the circumstances we are unable to hold that he had lost his rights as a passenger while off. The law would regard him as still a passenger on the train and in that particular there would be no variance between the proof and declaration.

There is no error in the instruction given on behalf of appellee to the effect that it was the duty of the jury to give certain damages. The damages mentioned in the instruction were those actual in their character and not exemplary, as they were in the Chisholm case, cited in 79 Ill. 584.

Perceiving no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

 ROBERTS C. GRISWOLD

V.

GREGG, SON & COMPANY.

Negotiable Instruments—Notes—Gaming Contracts—Option Deals on Board of Trade—Instructions.

In an action on a promissory note, where the defense is that it was given by the defendant to the plaintiff as a commission merchant in settlement of differences arising under a contract to deal in options on a board of trade for the defendant's account, it is improper to instruct the jury that the plaintiff can recover if he intended at the time of the purchase or sale to receive or deliver the grain bought or sold, the test of the character of the contract being the intention of the parties thereto.

[Opinion filed December 9, 1887.]

Griswold v. Gregg, Son & Co.

IN ERROR to the Circuit Court of Livingston County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. STRAWN & PATTON, for plaintiff in error.

Messrs. MOLLUFF & TORRANCE, for defendant in error.

LACEY, J. This suit was brought by defendants in error against plaintiff in error to recover on certain promissory notes amounting in the aggregate to \$2,192.34, given by plaintiff in error to defendants in error. No general issue was pleaded, but the defense set up by special plea by plaintiff in error was, in substance, that defendants in error were commission merchants dealing on the board of trade at Chicago, and made arrangements with defendants to ostensibly buy and sell grain on the board, but that all losses and gains be settled between them by the mere payment of differences in money, it being understood that no delivery of grain was to be made by either party, and that the notes sued on were given to cover plaintiff in error's losses under said gambling contract.

According to the plaintiff in error's testimony, prior to the time he commenced to deal with the defendants in error on the board of trade, he had an express agreement with them that he would deal in options, buy grain on the board of trade where the grain would not have to be taken, and if the price was more, when the time arrived to take it the difference was paid in money, and if plaintiff in error sold and the price was less, defendants in error paid the money, no grain to be delivered. Upon this agreement the defendants in error were to be paid one-eighth of a cent per bushel for commission. The deal in substance was between plaintiff in error and defendants in error, the former selling with the latter on account of such deals, not knowing with whom the defendants in error dealt on the board of trade. According to the evidence of plaintiff in error, the contract was essentially a gambling contract, in its nature the same as that in *Pearce v. Foote*, 113 Ill., 228, and, as decided in that case by the court, obnoxious to the

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provisions of the statute against option contracts. As between the plaintiff in error and defendants in error, if this was a gambling contract, they were both principals and stood to each other in the relation of principals. As is said in *Pearce v. Foote, supra*, "There is and can be no such thing as agency in the perpetration of crime or misdemeanor, or indeed, of doing any unlawful act. All persons actively participating are principals."

The defendants in error testified that the deals were not to be and were not fictitious but *bona fide*, and the intention was to deliver the grain, and they acted merely as plaintiff in error's agent.

A long course of dealing was had on the board of trade by defendants in error for plaintiff in error and all the deals were settled on difference; no grain was actually delivered. The jury found a verdict for defendants in error on the notes, and judgment was rendered thereon, from which this writ of error is issued out.

One of the main causes for error assigned by plaintiff in error is the giving of defendants in error's 13th instruction. The objectionable part of the instruction reads as follows: "And in this case, if you find from the evidence that Gregg & Son, as the agents or commission merchants of defendant, Griswold, either bought or sold, or both bought and sold, all the grain for the defendant in good faith, intending at the time of the purchase or sale, as the case may have been, to receive or deliver the grain, you will find for the plaintiffs, although you may further believe from the evidence that at the time or times of such purchase or sale the defendant had no grain and did not intend to receive or deliver any actual grain."

This puts the test of the character of the contract on what was done or intended by and between the appellees in their transactions on the board of trade with their customers, and not on what was the agreement between plaintiff in error and defendants in error. The plaintiff in error Griswold testifies that the only agreement between him and defendants in error, was that the latter were to deal with him as agents in strictly

option deals on the board of trade. So as between plaintiff in error and defendants in error the former was not to be called on to actually deliver any grain and in fact he never was requested to deliver grain or notified he had to do so, or to receive any. He was not concerned as to how the defendants in error dealt with their customers; for as between him and them it was strictly an "option" deal as he swears.

In what manner they made up their books with their board of trade customers he was not concerned, and in fact he did not, nor could he know with whom appellees dealt. This case in its facts and the principle governing it is much like the case of *Pearce v. Foote, supra*. As is said in the case cited in reference to the facts therein, and which applies equally well in this case, plaintiff in error "contracted to give" defendants in error, "the privilege to deal in options and settle with him upon differences, as indicated or determined by the fluctuations of the market." This was testified to by the plaintiff in error. Now the instruction complained of raises an immaterial issue and virtually takes from the jury all consideration as to what the contract was, between plaintiff in error and defendants in error, which was the vital issue in the case. If the defendants in error dealt on the board of trade in a *bona fide* manner, free from the charge of "gambling," they must have undertaken to receive and deliver the grain on their own account, for they were not authorized to make absolute contracts, as claimed by plaintiffs in error, on his account, and if they were not so authorized he was not bound to fill such contracts and indeed never was called on to do so.

It seems to us that where the evidence, as in this case, so strongly tends to show that the transactions on the board of trade were intended, as between the plaintiff in error and defendants in error, to be "gaming" contracts, the instruction complained of must have confused the minds of the jury and produced the result attained.

There are other minor objections to the record urged by plaintiff in error but they not being of great importance we will not notice them in detail further than to say that in them-

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selves, if error, they would not be of sufficient importance to reverse.

For the error above indicated the judgment in the court below is reversed and the cause remanded.

Reversed and remanded.

FREDERICK KAMMAN
V.
THE PEOPLE OF THE STATE OF ILLINOIS.

Sale of Liquors to Person in Habit of Getting Intoxicated—Indictment—Instructions—Question for Jury.

1. In a prosecution for selling liquors to a person in the habit of getting intoxicated it is improper to instruct the jury that, when a person gets intoxicated from three to five times within two years, he is in law a person who is in the habit of getting intoxicated.

2. Whether a person is in the habit of getting intoxicated is a question of fact for the jury.

[Opinion filed December 9, 1887.]

APPEAL from the County Court of Kankakee County; the Hon. THOMAS S. SAWYER, Judge, presiding.

Compare the following case of *Birr v. People*.

Messrs. BARNUM, RUBENS & AMES, for appellant.

Mr. H. L. RICHARDSON, State's Attorney, for appellee.

BAKER, J. Frederick Kamman was convicted in the County Court of Kankakee County, upon three counts of an indictment, two of which were for selling intoxicating liquors to Chauncey Donbridge, a person in the habit of getting intoxicated, and the other for selling such liquors to said Donbridge when he was intoxicated.

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There was no evidence in the record of any sale by Kamman of liquor to Donbridge at a time when the latter was intoxicated, and therefore the conviction upon the third count of the indictment can not be sustained.

The fifth instruction for the people was as follows: "You are instructed that when a person gets intoxicated from three to five times in two years, then in law he is a person who is in the habit of getting intoxicated." The instruction was erroneous, as there is no such rule of law as that therein stated.

Whether or not a man is a person in the habit of getting intoxicated, is a question of fact for the jury to determine from the evidence in the particular case.

The sixth instruction for the people, as well as that above mentioned, plainly usurped the province of the jury, and was erroneous. It assumed to tell the jury that if Donbridge was drunk on several particular occasions that were specified in the instruction, "then that evidence proves that he was at the time of the sales a person in the habit of getting intoxicated."

Several of the other instructions given at the request of the prosecution were inaccurate, uncertain and ambiguous, but their defects can readily be remedied at another trial, and there is no necessity for particularly pointing them out.

For the errors mentioned, the judgment is reversed, and the cause remanded.

Reversed and remanded.

HERMAN BIRR

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Sale of Liquors to Habitual Drunkard—Indictment—Instructions.

1. In a prosecution for making sales of intoxicating liquors to a person in the habit of getting intoxicated, it is error to instruct the jury that a man who gets intoxicated from three to five times in two years is a person who is in the habit of getting intoxicated.

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2. There is no rule of law fixing the number of times a person must become intoxicated within a stated period in order to constitute him "a person in the habit of getting intoxicated." It must be shown that he has been frequently intoxicated, and has thereby acquired an involuntary tendency to become so, and that, at the time of the sale complained of, he is in the habit of getting intoxicated.

[Opinion filed December 9, 1887.]

APPEAL from the County Court of Kankakee County; the Hon. THOMAS S. SAWYER, Judge, presiding.

Compare the preceding case of *Kamman v. People*.

Messrs. BARNUM, RUBENS & AMES, for appellant.

Mr. H. L. RICHARDSON, State's Attorney, for appellee.

BAKER, J. Herman Birr was tried in the County Court of Kankakee County upon an indictment which contained three counts charging him with making sales of intoxicating liquors to Herman Tracy, a person in the habit of getting intoxicated. He was acquitted upon all of the counts except the first, and upon that he was convicted and judgment rendered against him for a fine of \$30 and for costs.

At the request of the prosecution the court instructed the jury that "when a man gets intoxicated from three to five times in two years he is a person in the habit of getting intoxicated, and you should so find." This instruction was very clearly erroneous. There is no rule of law fixing the number of times a person must become intoxicated within a stated period in order to constitute him or her "a person in the habit of getting intoxicated." The only rule the law prescribes in that regard is this, that it must be shown and that it is sufficient to show, that the person claimed to be "a person in the habit of getting intoxicated" has been frequently intoxicated, and has thereby acquired an involuntary tendency to become intoxicated. *Murphy v. The People*, 90 Ill. 59. The law goes no farther than this; and it then becomes a question of fact for the jury, to be determined from the

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evidence, whether or not such person is "a person in the habit of getting intoxicated. True it is, that in *Murphy v. The People* the evidence was Leahy had been drunk from three to five times within two years, and from such evidence the jury found as a fact that he was in the habit of getting intoxicated, and that the Supreme Court refused to disturb the verdict. But in so doing the court was merely considering the matter from an evidential point of view, and held that from the evidence they were unable to say the jury was unauthorized to find that Leahy was in the habit of getting intoxicated.

The fourth instruction for the prosecution was ambiguous, inaccurate and misleading. It is essential to the statutory offense in question that the person to whom the liquor is sold is, at the time of the sale, in the habit of getting intoxicated. *Weidemann v. The People*, 92 Ill. 314. Under the instruction, as we understand it, the jury might have found the defendant guilty of the offense charged, even if the evidence was that Tracy had contracted the habit of becoming intoxicated a year or more after the defendant made any sales of intoxicating liquors to him.

For the errors in the instructions the judgment is reversed, and the cause remanded.

Reversed and remanded.

ROBERT HILL

V.

LORENZ REITZ.

Lis Pendens—Privity between Plaintiff and Defendant in Execution—Action against Sheriff.

1. The plaintiff and defendant in an execution issued, pending a trial of the right of property between the latter as claimant and the judgment creditors of a third person, in goods levied on as the property of such third person, are in such privity of relation that both will be alike bound by a judgment finding the rights of property against the claimant.

2. An action does not lie against the Sheriff for failure to levy an execu-

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tion issued pending the trial of the right of property under the former levy on the property as that of a third person.

[Opinion filed December 9, 1887.]

APPEAL from the Will County Circuit Court; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. OLIN & PHELPS, for appellant.

Mr. C. W. BROWN, for appellee.

LACEY, J. This was an action in case commenced by appellant against appellee, who was Sheriff, to recover damages against him for failure to levy certain executions issued out of the Circuit Court on transcripts from a Justice of the Peace in favor of appellant and against one Hannah Floxman, amounting to about \$314.56.

The facts are about as follows: The appellee held in his hands an execution in favor of Sherwin & Co., against Simon Floxman, husband of Hannah, and one Runstein, and had levied on certain goods as the property of said Simon to satisfy said execution. Hannah Floxman served a notice in writing on the appellee that she claimed the goods as her property, and the case was tried in the County Court on proper issues formed, and the rights of property decided to be in the said Hannah. Thereupon Sherwin & Co. appealed the case to the Circuit Court. Subsequently to this time certain transcripts in favor of appellants on judgments from a Justice of the Peace, against said Hannah, were filed in the Circuit Court, and executions issued thereon and placed in the hands of the appellee as Sheriff, and he notified by appellants in writing to levy the same on the said goods as the property of said Hannah. Subsequently to this, while the suit for the trial of the right of property was pending in the Circuit Court, the said Hannah, the plaintiff therein, waived a jury and submitted the case to be tried by the court, which trial resulted in favor of Sherwin & Co., and judgment was rendered against her, the court finding the title to be in her husband. The goods were after-

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ward all sold and the proceeds of the sale applied on the said execution of said Sherwin & Co. against Simon Floxman *et al.*, so far as they would go. Had the proceeds of sale been applied to the payment of the appellant's executions, they would have more than satisfied them. Appellant's executions were never levied and were afterward returned "*nulla bona.*" It is claimed that a liability exists against the Sheriff to recover for refusal to levy appellant's executions on the goods, the proof tending to show that they belonged in fact to Hannah Floxman. It will be conceded that this would be so unless the judgment in the case of Hannah Floxman v. Sherwin & Co., trial of the rights of property, was a bar to appellant's right to claim the goods as the property of said Hannah, she being insolvent except for these goods.

The court below held that the judgment in the rights of property case was a bar and gave judgment against appellant for costs, from which this appeal is taken.

This is the question to be settled by this court:

Does the plaintiff in an execution issued against the claimant in a suit for the trial of the rights of property, while such suit is pending, wherein the Sheriff had levied an execution issued against a third person on certain goods claimed both by the judgment creditors of the defendant in the execution and said claimant, occupy the relation of privy to such claimant in such manner as to be bound by a judgment of the court finding the rights of property in the defendants in the execution? We think it does. And applying the law to this case we are satisfied that the appellant must be bound by the result of the suit in which Mrs. Floxman was claimant. The trial of the rights of property was pending when his executions were issued, and Mrs. Floxman claimed the goods in the manner pointed out by the statute. If she succeeded, then Sherwin & Co. could have no claim in the goods and the appellant's execution would immediately attach. She was fighting the battle for appellant. Before she instituted her suit claiming the goods appellant had no standing in court whatever and without his execution he could have none. So he must be regarded as having acquired his rights *pendente lite* and is bound by the result of the litigation.

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It is insisted by counsel for appellant that the plaintiff and defendant in an execution as to defendant's property, stand in a situation of antagonism and for that reason there is no privity. We think such suggestions misleading. If sale takes place under execution the purchaser at the sale must necessarily derive title through the defendant in the execution. Before any liens are acquired the title to the property must be controlled by the owner and by the result of the litigation by the owner concerning his property in case there be no fraud.

These goods were already in the custody of the law and Mrs. Floxman in litigation with the party for whose benefit they were sold to determine the title. The appellant cites for authority Watts' Appeal, 35 Pa. St. 523, cited in Bigelow on Estoppels, page 280, 281. In the citation it is said that no privity exists between a judgment creditor and his debtor, but their relation is one of antagonism. According to the peculiar facts in Watts' Appeal, *supra*, the application of that rule of law may have been proper. Judgment creditors, in that case, were entitled to the money arising from a sale of the land of their judgment debtor under the judgment as against another judgment creditor, who, while his judgment was in existence, had deeded the land on which his judgment was a lien for the purchase money to the common judgment debtor. The subsequent judgment debtors were not held to notice that as between the common judgment debtors and the prior owner of the land, and at the same time judgment debtor, there was a secret agreement between them that the lien of the judgment debtor on the land for the purchase money should still exist. The prior owner and judgment creditor was estopped by his deed to the common judgment debtor; and the court in that case held that the subsequent judgment creditors were not in such privity with the common judgment debtor as to the land sold under their execution that they would be held to notice of this secret agreement to keep above the judgment lien of the prior judgment creditor contrary to the purport of his deed. The court further held that in such case there was such antagonism between those creditors and

the common judgment debtor, as to relieve them from being chargeable with such notice.

In other words, those judgment creditors were regarded as standing in the light of innocent purchasers as far as their judgment lien was concerned, on account of being misled by the deed executed before their judgment was entered. It is doubtful whether that would be held to be the law in this State. But conceding it, the case is quite different from the one at bar, and could have no application here, where Sherwin & Co. had done nothing to mislead the appellant in regard to their claim that the goods belonged to Simon Floxman, but on the contrary they pushed their claim to final success in establishing the title to the goods in their judgment debtor and procured the sale of the goods under execution against him, while the appellant stood idly by and made no effort other than to put his execution against Mrs. Floxman in the hands of the Sheriff and notifying him to levy on them as the property of Mrs. Floxman, while at the same time he held them on a prior levy as the goods of her husband. We think under the facts of this case the doctrine of *lis pendens* will apply in its full force to appellant. Mrs. Floxman had come in under the statute before the issuing of appellant's execution against her and was contesting the title with her husband's creditors, and appellant was not in antagonism as to her claim of title in the goods; his interest and hers were the same. The law would not presume that she would fraudulently assist to defeat her own title. However, if she and her husband's creditors, with the knowledge of the appellee, fraudulently colluded to defeat her title in order to defraud her creditors and to fraudulently allow the suit to go against her, then the antagonism should be held to exist, and the appellant be allowed to show those facts and that the title to the goods was in Mrs. Floxman, and thereby defeat the bar of the judgment, otherwise not. There was no attempt to do so. The doctrine of *lis pendens* applies to rights acquired under sale under judgment executions and sales and *pendente lite* incumbrances. Cooley v. Bayton, 16 Ia. 19; Steele v. Taylor et al., 1 Minn. 273; Jackson v. Warren, 32 Ill. 331, 341.

The judgment must be affirmed. *Judgment affirmed.*

Dewein v. City of Peoria.

VALENTINE DEWEIN
v.
THE CITY OF PEORIA.

Municipal Corporations—Street Improvements—Drainage—Percolation of Water—Action for Damages.

1. In an action against a municipal corporation to recover damages to the premises of the plaintiff alleged to have resulted from the percolation of water from a trench dug in the street for a water pipe and filled up with soft, porous and spongy material without any sufficient outlet for the water accumulating therein, it is *held*: That the plaintiff was not injured by the errors, if any, of the court below in giving instructions or touching the admission of evidence; that the evidence does not sustain the alleged cause of action; that evidence that there was more water in the plaintiff's cellar and premises after than before the completion of the improvement, was but slight proof and was entirely overcome by other evidence.

2. It *seems* that a municipal corporation is not liable for damages for supposed injuries where it has dug a ditch in a street and filled it with the same soil, although the soil therein is somewhat more porous than before.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

The appellant was the owner of block 1 in Armstrong's Addition to Peoria, which he divided into four lots and at and before the time of the alleged injury to the same by the means hereafter mentioned, owned and occupied the same.

He had built a residence on lot 4 (the northeast quarter of the block), costing some \$15,000. Appellant's premises are bounded by the Knoxville road on the east, Lynn Street on the west, Armstrong Avenue on the north and Chambers Avenue on the south. There was a deep ravine cutting appellant's premises from the northwest corner to the southeast corner, leaving the house on the northeast side of it. This ravine in a somewhat flattened shape extends from the northwest corner of appellant's premises diagonally across Armstrong

Avenue and extended up toward the bluff into the block lying immediately west and north of appellant's block, past the house known as Odell's, for some distance.

This ravine was originally fifteen or more feet deep where it ran through appellant's block. At the place where the appellant built his house there was a little knoll projecting from the main bluff from which the water drained in a southerly direction.

Jacob Guyer had a residence just opposite appellant's on the block just north across Armstrong Avenue, though being thirty to fifty feet further east and fronting south on said last named avenue.

Prior to the time appellee graded Armstrong Avenue, in 1883, the water on Armstrong Avenue between appellant's premises and Guyer's, and also from appellant's premises, ran toward the Knoxville road. The ground sloped toward the city. The Knoxville road runs directly north to the bluff about two blocks from appellant's southeast corner and has quite a steep grade rising toward the north about thirty-four feet. From the Knoxville road to Lynn Street on Armstrong Avenue, one block directly west, the ascent is some three and one-half feet, and from Lynn on the same avenue to Bigelow Street, one block further west, the ascent is still more rapid till the summit of the bluff is reached, a short distance further west. Running in a meandering line from the intersection of Bigelow Street and Armstrong Avenue to a point a little to the north of the intersection of the Knoxville road and Pennsylvania Avenue, would represent the summit of the bluff.

The drainage from the summit of the bluff south was in a general southeasterly direction over the blocks that Guyer and Odell were on, to the appellant's block and across over that. Considerable of the water coming from east of Bigelow Street and west of the ravine across appellant's lot drained down through that ravine.

In the fall of 1883 appellee graded Armstrong Avenue all the way going east from North Street up to the west side of the Knoxville road. This improvement required the excavation of the earth from eighteen to twenty-two inches in Arm-

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strong Avenue, the replacing it with eighteen inches in the center and twelve inches at the sides and the setting of curb stones, the upper edge of which was to be ten inches above the gravel at Lynn Street; they were of the same height on the upper and lower side of Armstrong Avenue. That at the lower side extended along the depression at appellant's northwest corner. The curb stone was set twenty feet from the line of the lot and the space between appellant's lot and the curb stone was filled up with earth at appellant's request. A part of the earth taken from the street was used by him to fill up to the grade of the sidewalk. A portion of this sidewalk next the curb was used as a grass plat.

At the Knoxville road the curb on the upper side of Armstrong Avenue is one foot and six inches higher than the lower side, giving a fall of two feet on the upper side and three feet six inches on the lower side, between Lynn Street and the Knoxville road. The curb stones and the graveling are well laid and the street is in good condition to outward appearances at least. After the excavation of this earth in Armstrong Avenue, winter came on and stopped the work before the gravel was filled in, and considerable water gathered therein and laid there all winter, but this is not the injury complained of, as the street was completed before any damage was shown to have been done by it.

The damages complained of and for which recovery is sought in the declaration, resulted from the causes now to be mentioned. As a part of the improvements made, appellee laid a water pipe on Armstrong Avenue all the way from North Street to the Knoxville road, a distance of three blocks. The trench dug for the water pipe was some five feet deep and two feet wide, the water pipe was laid at the bottom, and the ditch was then again filled with the same dirt taken out of it, and the gravel put over it and the street rolled.

The declaration avers that the ditch was filled up with soft, porous earth and thereby changed the drainage along the course of the said drain so filled up, of water below the surface of the ground, from its natural course; that by the reason thereof, the water falling in time of rain or collecting from

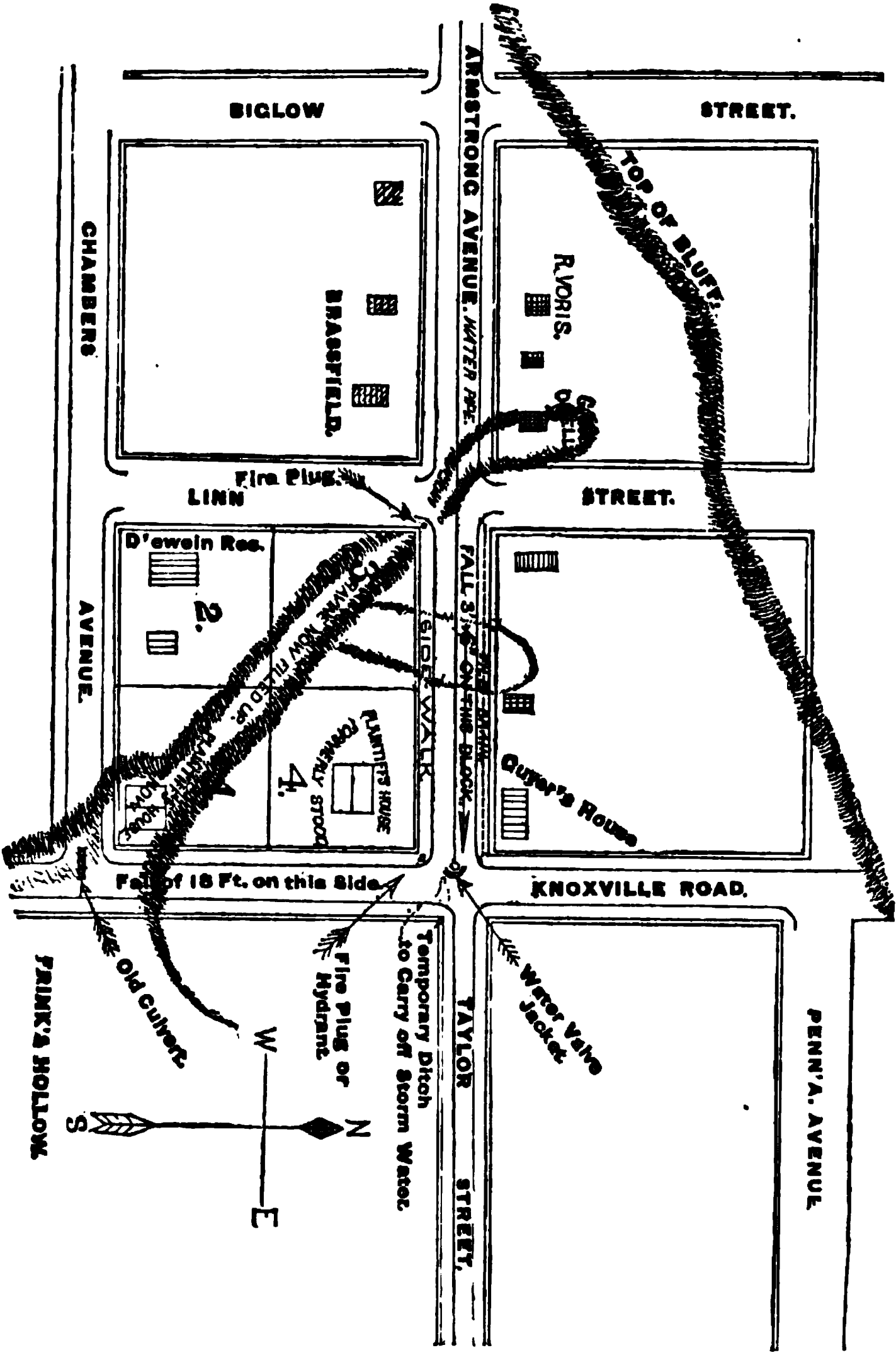
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melting snows and ice upon higher lands north and west of the premises of the appellant and upon said street, so in possession and under the control of appellee, were caused to flow over and percolate through the ground out of their natural course in and upon and along Lynn Street and in and upon Armstrong Avenue and in and along said ditch or trench so filled up with soft porous and spongy material, and without any sufficient outlet for the water collecting therein, and thereby the said waters were caused to collect, stand and accumulate in, upon and beneath the surface of the ground along the said Armstrong Avenue where the same runs along Lynn Street and the Knoxville road and opposite the premises of the appellant, and that the same were caused to flow over and percolate the soil and clay etc., of the plaintiff, in and upon his premises, and to enter and fill the cellars and boiler room of his dwelling house and to saturate the brick walls and to soak into the siding, floors and woodwork of the same, etc., and to crush in the walls of his cistern, etc., and rendered the appellant's lands swampy, etc., and injured his buildings and rendered the house unfit for use. The appellant declares for damages in a large sum.

The cause was tried by a jury and resulted in a verdict for the appellee and judgment rendered against the appellant for costs, from which this appeal is taken.

Attached is a substantial drawing of the appellant's premises and all the surroundings, which will make it easier to understand the situation of affairs.

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Messrs. McCULLOCH & McCULLOCH, for appellant.

Appellee, in the improvement of its streets, is, in respect to the control of surface water, to be governed by the same rules as are private persons. *Nevins v. City of Peoria*, 41 Ill. 502; *Rigney v. Chicago*, 102 Ill. 64; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 29; *Gillison v. Charleston*, 16 W. Va. 303; *Inman v. Tripp*, 11 R. I. 520; *O'Brien v. St. Paul*, 25 Minn. 331.

Surface water is that which falls upon the ground in times of rain, or which accumulates from melting snow and ice, whether the same lies upon or flows over the surface or percolates through it, and so continues to be surface water until it has reached some defined channel. *Wheatley v. Baugh*, 25 Pa. St. 528; *Haldeman v. Bruckheart*, 45 Pa. St. 514; *Cooper v. Barber*, 3 Taunt. 99; *Broadhent v. Ramsbotham*, 11 Exch. 602; *Rawson v. Taylor*, 11 Exch. 369; *Livingston v. McDonald*, 21 Iowa, 160; *Chatfield v. Wilson*, 28 Vt. 49.

The liability is the same when it causes injury by the division of surface water as it would if it diverted a running stream and caused it to flow upon appellant's premises. *Peck v. Herington*, 109 Ill. 611; *Pixley v. Clark*, 35 N. Y. 520; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Gormly v. Sanford*, 52 Ill. 158.

The owner of the dominant heritage can not impose upon a servient any burden which the latter was not obliged by nature to bear. *Hicks v. Silliman*, 93 Ill. 255; *Peck v. Herington*, 109 Ill. 611; *Mellor v. Pilgrim*, 3 Ill. App. 476; *Same v. Same*, 7 Ill. App. 306; *Pixley v. Clark*, 35 N. Y. 520.

Messrs. I. C. PINCKNEY and H. W. WELLS, for appellee.

No action lies against the owner for interfering with or destroying, percolating or circulating water under the earth's surface. *Pixley v. Clark*, 35 N. Y. 527; *Acton v. Blundell*, 12 Mees. & Wels. 324.

An owner may dig upon or cultivate his own land at pleasure though he cut off or open water, circulating or dead, under the earth, to his neighbor's injury. Such water is not different from the earth itself. He owns it. He does not own the

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water of a surface stream, and can not set it back to another's injury without liability. *Pixley v. Clark*, 35 N. Y. 531.

It is a well recognized principle that when a thing not *malum in se* is authorized to be done by a valid act of the Legislature and is performed with due skill and care in strict conformity to the provisions of the act, its performance can not, by the common law, be made a ground of action, however much one may be injured by it. *Rigney v. Chicago*, 102 Ill. 64.

We submit the city had an unquestioned right to improve the street as it did. The improvement was a public work of great utility and the work was done in a most skillful manner. Such being the case we submit the city can not, under the authority last cited, be liable for such consequences, which could not have been anticipated when the work was done.

LACEY, J. The grounds upon which appellant seeks a reversal in this case are that the court below gave improper instructions for appellee and admitted improper evidence on the part of appellee and refused to allow certain evidence on the part of appellant.

We have examined the evidence in the case with much care and have come to the conclusion that there is such a lack of evidence on the part of appellant that the jury ought not to have found in his favor under any state of instructions and without reference to the request of appellant to the City Council to put in the sewer complained of. The main burden of the appellant's proof goes to show that there was more water in his cellar and premises after the completion of the grading of the street and the putting in the water pipe than there had been before, and the jury was asked to infer from this fact that the putting in the water pipe by appellee was the cause of the trouble.

This kind of evidence at best is only slight proof, but when we come to consider the other evidence in the case, that all or nearly all the other property that laid west and north and higher than the surface of the street along and north of appellant's residence was similarly affected by water with his, even the force of that evidence is destroyed.

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It seems that the soil along the side of the bluff in the neighborhood was of such a nature that in times of excessive rainfall it would fill with water and fill the cisterns and cellars in that neighborhood notwithstanding the great fall there was to the south.

To such an extent did this take place that cisterns would be broken in by the great pressure and the weight of the water gathered around them and cellars would be filled. Of course water was all the time making its way down grade and the lower it went the more water would accumulate.

Mr. Guyer, a witness introduced by the appellant, shows that the soil on each side is common clay and was full of water. He says: "On one part of my lot I dug a cess pool and found water four feet from the surface." Four feet would not be as low as the surface of the street, saying nothing about the water-pipe ditch. "I had water in my cellar before the improvements were made but not so much as since." "The bottom of my cellar is two or three feet higher than the surface of the street. Dewein's place is a little lower than mine. From the Knoxville road on that high land clear over to Elizabeth Street there is a great deal of water in the ground and a good many cellars and cisterns have water in them; cisterns have been broken in with the surface water and privy vaults have been filled by surface water. My cistern that was broken was full. The surface water was then ten feet above the level of the street." The theory is advanced that the water rose from below in the ditch into Guyer's cellar by means of the law of capillary attraction. Such a theory as that is wholly inadmissible. His cellar was over ninety feet from the place where the water pipe was buried and there are no known laws of nature that would justify the belief in such result. The street in front of appellant's house had a good fall to the east to the Knoxville road, and had a good level grade to that road, and does not appear to have been overflowed by water on the surface and none could possibly reach appellant's premises from the surface on account of the intervening curb stone. Appellant's house was ninety feet from the water-pipe ditch and evidently water percolated

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through the intervening clay if it reached there from the street at all, which it is likely it did.

The tests showed that the street beneath the gravel was full of water as well as the intervening clay soil between it and plaintiff's house, and all on about the same level. But other tests showed that in the water pipe ditch, at the Knoxville road, it was much lower. This shows that water did not run down along the water pipe very readily at that point, otherwise the water would have been as high at that point as above, barring the descent in the grade.

It is more than likely that the filling up of the ravine west of appellant's house, which he did very considerably, had a tendency to cause water to accumulate in his cellar. The ravine was sixteen feet deep, and would have a strong tendency to draw the water out of appellant's lot for a considerable distance back toward his house, and perhaps drain it below the bottom of his cellar, and that may account for his cellar being dry theretofore.

But when the ravine is filled up to the extent it was, it no doubt stopped the heavy drainage that it had before. The water did not appear in appellant's cellar till 1885, a year after this water pipe was put in. The substance of the appellant's complaint is that appellee, in making the needed improvements along the street, necessarily loosened up the soil in its excavation by first digging it out and then restoring it, and made it a little easier for water to pass through it, and in consequence he has been damaged.

We are of the opinion that the appellant has no remedy for such an injury as that. There has been no ditch left open; no drain has been cut. The cases of *Livingston v. McDonald*, 21 Ia. 160, and *Mellor v. Pilgrim*, 3 Ill. App. 476, in their facts, are not like those in this case. In each of these cases water had been collected by means of tile drains and flowed onto the lands of the plaintiff by that means. But suppose a ditch had once been dug and then filled up with the same soil, would the law notice any claim for damages for supposed injuries resulting from the fact that the soil, in the excavated and filled-up ditch, was a little more porous than before and allowed a little more water to percolate through it?

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Public policy and the good of society would preclude such rule. The rule announced in the two cases above, we understand to have been considerably modified by the case of *Peck v. Herrington*, 109 Ill. 611, the principles announced in which, if carried out to legitimate inference, would prevent recovery in this case. It will not be necessary to notice the other point in regard to appellee showing that appellant requested and promoted the laying of the water-pipe, damages to recover for which act he now sues.

The evidence, we think, would not justify a jury in rendering a verdict in favor of appellant. The instructions given for the appellee, as applied to the evidence in the case, were not erroneous. The judgment is therefore affirmed.

Judgment affirmed.

JOHN TANTON
v.
JOHN E. VAN ALSTINE.

Landlord and Tenant—Tenancy from Year to Year—Termination of—Notice—Instructions.

1. A tenancy from year to year, although commenced under a parol agreement, can only be determined by the statutory notice of sixty days, in writing.

2. In an action to recover rent under a tenancy from year to year, in the absence of the required notice to determine the tenancy, it is error to instruct the jury that the defendant is not liable unless he actually used and occupied the premises for the year in question.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Woodford County; the Hon. N. W. GREEN, Judge, presiding.

Mr. W. L. ELLWOOD, for appellant.

No brief was filed for appellee.

Tanton v. Van Alstine.

BAKER, J. Tanton, appellant, was the owner of a forty-acre tract of land that was surrounded on all sides by lands owned and occupied by Van Alstine, appellee. In 1878 or 1879, the witnesses are uncertain which, the parties entered into a verbal contract by which appellant rented said forty acres to appellee at \$50 a year, no length of time the lease was to continue being agreed upon, and the arrangement being that either party should give the other notice of his intention to end the lease. It seems the land was occupied by the tenant and the rent settled for at \$50 a year down to March 1, 1884. This suit was for the recovery of \$50 for rent for the year ending March 1, 1885. On appeal from a Justice of the Peace, a trial in the Woodford Circuit Court resulted in a verdict and judgment for appellee.

Tanton contends that he is entitled to recover the \$50 under the terms of his express contract; while the position of Van Alstine seems to be that as that contract was verbal and made in 1878 or 1879 he is not responsible for the rent of 1884 unless he used and occupied the land that year. While he insists he did not use the land in 1884, the evidence tends to show that he that season pastured Gould's cattle thereon, as well as on his own land. We do not, however, regard this matter as very material in the settlement of the present controversy.

In the view we take of the case we may wholly ignore the terms of the special agreement, and all consideration of the provisions of the Statute of Frauds. It is an admitted fact that appellee took possession of the premises as tenant of Tanton in 1878 or 1879, and continued in the use and occupation of them until 1884, and each year paid or settled \$50 a year as rent therefor. The tenancy thereby became a tenancy from year to year, and each party was bound to give the other at least sixty days' notice in writing in order to terminate the tenancy at the end of the year. Sec. 5, Statute of Landlord and Tenant. As tenant from year to year, Van Alstine was entitled to the statutory notice to quit, and could not have been evicted from the land by his landlord without such notice. *Prickett v. Ritter*, 16 Ill. 96; *Creighton v. Sanders*, 89 Ill. 543. The rights of the parties in this respect were reciprocal, 4 Kent's

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Com. 111 and 112. The evidence shows that no notice to terminate the estate was given by either party. Appellee, then, had the right to use and occupy the land during 1884, and if he did not do so it was his own fault, and whether he used the land or not, he was liable for the rent of that year. In all cases of a renting from year to year or month to month the holding will be construed to be at the same rent unless there be some act of one or both of the parties to rebut such an implication. Prickett v. Ritter, 16 Ill. 96; Clapp v. Noble, 84 Ill. 62; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151. Our conclusion is, that the verdict of the jury should have been for appellant for \$50.

At the trial, the court, at the instance of appellee, instructed the jury that he, appellee, was not legally bound to use the land for the year 1884, and was not liable to pay rent for the same for the year 1884, unless the jury believed from the evidence that he used and occupied the same for that year. Such instruction was in conflict with the views we have herein expressed, and was erroneous, and, without doubt, it induced the jury to return the verdict they did.

The judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

RANDALL SMITH
V.
JOSEPHINE MOHLER.

Replevin—Chattel Mortgage—Fraudulent Intent—Evidence—Instructions.

In an action of replevin to recover the possession of a piano held by the defendant under an execution against a third person, it is *held*: That evidence touching the validity of a certain chattel mortgage on the piano was properly excluded, the genuineness of said mortgage not being in issue; that the verdict is not so manifestly against the weight of evidence as to require a reversal; and that there was no error in the instructions.

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[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Bureau County; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. ECKELS & KYLE, for appellant.

Messrs. GIBONS & GIBONS, for appellee.

LACEY, J. This was a suit of replevin brought before a Justice of the Peace, by appellee, to recover the possession of a piano which she claimed as her property. The appellant was a Constable and had taken it on execution in favor of Isaac Conant against Frank and Samuel Mohler, claiming and levying on the property as that of Frank Mohler. The trial taking place in the Circuit Court, resulted in favor of appellee.

The issue in the case was, as to whether the piano was the property of Frank Mohler or appellee. The appellee testified that she purchased the piano of Frank Mohler, December 24, 1885, for \$100 cash, paid to, or to the use of, Frank Mohler.

In order to contradict the appellee in regard to her claim of ownership of the piano, several witnesses were put on the stand who testified to statements claimed to have been made by her subsequently to the time of the alleged purchase contradictory to her claim of property in the piano, and also to show that a certain chattel mortgage taken by her for \$3,100, from said Frank and her husband, on the piano and other property on December 18, 1885, was fraudulent.

Appellant attempted to prove by one Steele, that Frank Mohler, out of the presence of appellee and before the mortgage was executed, stated he intended to make a bogus chattel mortgage to appellee. The court ruled out this proposed proof, and, we think, correctly. The question of the genuineness of the chattel mortgage was not in issue, nor was Frank Mohler a party to this suit. If such evidence could be allowed to show that the mortgage was fraudulent, then appellee might have gone into that question and have shown that the mortgage was genuine.

This would have involved the trial of an issue not involved and the time of the court have been consumed uselessly. Even if such issue had been determined in appellant's favor it settled nothing, as the question whether there was a genuine sale of the piano to appellee, as she claimed, would still remain unsettled and undetermined. The execution of the chattel mortgage and the alleged purchase of the piano were entirely separate transactions, the sale not at all depending on the validity of the mortgage. It does not necessarily follow that because an intended fraud was committed in the one case that the sale in the other was fraudulent. It would only have established that appellee was fraudulently *inclined*. But such evidence could not be allowed to show guilt in another matter not invalid either in a civil or criminal case. The whole matter of the chattel mortgage having been fraudulent should have been rejected.

As to the question of the weight of evidence not supporting the verdict, we can only say that while this court might have been better pleased with a verdict the other way, yet it is not so manifestly against the weight of the evidence as requires that the judgment should be set aside. The jury had the undoubted right to believe the testimony of the appellee to be true, notwithstanding her contradictory statements, and this court would not be authorized to interfere.

We see no serious error in the appellee's first and second instructions. The first appears to be without fault, and the second, so far as assuming that there had been sale of the piano to appellee, we think is not open to the criticism made. It only referred to the sale to fix a period of time in regard to the alleged fraud in the transaction, and evidently did not assume that there was a valid sale. Nor do we think it could be fairly understood that there was a sale at all. The main issue, as is shown by defendant's instructions, appeared to be the questions of fraud in the sale of the piano, and not whether there was a sale of some kind.

Complaint is also made that the court modified the appellant's instructions so as to hold her to be a party to the supposed fraudulent intent of Frank Mohler in making the sale

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of the piano to her, only in case the appellee had knowledge of such fraudulent intent, or had such knowledge of such transactions as "could reasonably and necessarily lead a reasonably cautious person to infer that said sale was made with intent to hinder and delay creditors."

The objection is made that the court erred in striking out the word "naturally" as the instruction was offered, and inserting the word "necessarily" as it was given. This was a proper modification as will be seen by reference to the decision of the Supreme Court in the case of *Boies v. Henney*, 32 Ill. 130, 145.

Seeing no sufficient error in the record to reverse the judgment it is therefore affirmed.

Judgment affirmed.

BOARD OF SUPERVISORS

V.

THE PEOPLE EX REL. COMMISSIONERS OF HIGHWAYS.

Bridges—County Aid—Power of Commissioners of Highways—Mandamus—No Discretion in County Board—Pleading.

1. The Commissioners of Highways have the exclusive power to determine when a necessity exists for constructing a bridge and the kind of bridge required, and to decide whether the conditions exist which entitle the town authorities to call for county aid.

2. The Commissioners' estimate of probable cost of a proposed bridge is not a part of the "official business" of the Board, which is required to be done at a regular or special meeting, or of the "official acts and proceedings" which are required to be kept in its record book.

3. The law does not require, in all cases other than those of an emergency arising from sudden destruction or serious damages, that the County Board shall actually appropriate from the county treasury, a sum sufficient to meet one-half the expense of a proposed bridge before it can be built or the contract therefor let by the Commissioners.

4. Where it appears, upon a petition for mandamus to compel a County Board to make an appropriation from the County Treasurer of a sum sulli-

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cient to meet one-half the expense of a proposed bridge, that the statutory conditions precedent have been substantially complied with, the writ will be awarded.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Kankakee County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. H. L. RICHARDSON and C. R. STARR, for appellant.

Messrs. WILLIAM POTTER and STEPHEN R. MOORE, for appellees.

BAKER, J. This was a petition for a mandamus by the people on the relation of the Commissioner of Highways of the town of Rockville against the Board of Supervisors of Kankakee County to compel them to make an appropriation from the county treasury, under the provisions of section 19 of the act in force July 1, 1883, in "regard to roads and bridges in counties under township organization" of a sum sufficient to meet one-half the expense of a bridge to be constructed over Forked Creek, where the same is crossed by the public highway between section 5 and section 8 in said town. The Circuit Court, on the trial, awarded a peremptory writ of mandamus to compel the Supervisors to grant the aid demanded.

Most of the material questions involved in the controversy arise upon the rulings of the court sustaining a demurrer to the 3d, 4th, 5th, 6th and 7th pleas, and overruling a demurrer to the replications to the 8th plea. It appeared from the petition, estimate and affidavit which were presented to the Board of Supervisors at their July meeting, 1886, that the bridge was needed, the town was wholly responsible for the work, and the total estimated cost of building it was \$1,000; that the cost of building the bridge would be more than 20 cents on the \$100 on the latest assessment roll of the town, and that the levy of the road and bridge tax for that year in said town was for the full amount of 60 cents on each \$100

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allowed by law for the Commissioners to raise, and that the major part of it was needed for the ordinary repairs of roads and bridges. The 4th, 5th and 6th pleas were alike in-respect to legal principle; the 4th averred that the major part of the road and bridge tax was not needed for the ordinary repairs of roads and bridges in the town, but on the contrary, said tax was enough for the ordinary repairs of roads and bridges and a surplus of at least \$1,000 for erecting said bridge; the 5th averred that the road and bridge money on hand taken with the 60 cents levied, etc., was sufficient to pay the cost of the bridge and that said money was not needed for the payment of outstanding orders and was not needed, nor the major part thereof, for the ordinary repair of roads and bridges, but was available for building said bridge; and the 6th plea averred that the amount of money necessary to pay the cost of the bridge was not needed for the ordinary repair of roads and bridges, and that the Commissioners had in their treasury and with the tax levied sufficient money for which there was no other superior demand to pay the cost of said bridge. It will be noted that not one of these pleas traversed the fact that the levy that year in the township of the road and bridge tax was for the full amount of 60 cents on each \$100 or denied that the petition which the Commissioners had presented to the Board of Supervisors stated that the major part of said tax was needed for the ordinary repairs of roads and bridges in the town. The matters of making improvements upon the public roads, of determining when a necessity exists for constructing a bridge over a stream, of determining the character of the bridge to be built and letting the contract to build it, of determining—within a certain maximum—what per cent. of tax shall be levied on the property of the town for road and bridge purposes and the payment of outstanding orders, and of deciding whether or not the major part of the sixty cents levied, allowed by law, is needed for the ordinary repair of roads and bridges, are all, by the statute, intrusted exclusively to the judgment and discretion of the Commissioners of Highways of the several towns. As was said by the Supreme Court in *New Boston v. Board of Supervisors*, 110

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Ill. 197, and reiterated in *Supervisors v. The People*, 118 Ill. 459, "as the Legislature has seen fit to commit such matters to the management of the local officers of the town, it is not the province of the courts, by judicial construction, to place it elsewhere."

The town authorities are better qualified to judge than are the courts, what amount of the road and bridge tax is needed for the ordinary repair of the roads and bridges in their town, and if the matter was left to the discretion of the County Board, it might frequently interfere with the proper operation of the statute and defeat the evident intention of the Legislature. We think the Circuit Court properly sustained the demurrer to the 4th, 5th and 6th pleas.

The substance of the 7th plea was that the estimate of \$1,000 was based upon the purpose to build an iron bridge; that an iron bridge was not necessary, and that a good, sufficient and suitable wooden bridge could be built at one-half the expense, and would not cost more than 20 cents on the \$100 on the latest assessment roll in said town. We have already stated that the matter of determining the kind of bridge to be constructed is vested wholly and only in the local authorities of the town. The two cases above cited by us seem to be very much in point. The plea was bad, and the court did right in sustaining the demurrer to it.

The substance of the 3d plea was that the estimate made by the Commissioners of Highways of the probable cost of the proposed bridge was not made at a regular or special meeting of the Board of Commissioners; that there is no official act by said Board of Commissioners making such estimate, and no record of the same. It is urged by appellants that the tenth section of the act of 1883 provides that "no official business shall be transacted by the Board, except at a regular or special meeting," and also that the Town Clerk shall be *ex officio* clerk of said Board, and shall keep a record of all the official acts and proceedings of the Board in a well-bound book, to be provided for that purpose, which record shall be signed by the president and clerk." We think these provisions have no application to the matter in hand. The various

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sections of the statute must be construed together, and each section and every provision should receive a reasonable construction. The nineteenth section says that the Commissioners may petition the County Board for aid, and that they shall make a careful estimate of the probable cost and attach thereto their affidavits that the bridge is necessary, and will not be made more expensive than is needed for the purpose desired; and further, said section makes provision that "such estimate and affidavit shall be filed with the petition." It would seem it is no more necessary the "estimate" should be entered upon the record of the Board than that the "affidavit," "the petition for aid," the petition for a writ of mandamus, and the various pleadings filed by the Commissioners in this suit should be entered upon such record. All of these various papers may, in one sense, be considered as "official acts and proceedings of the Board." It is the evident intention of the statute that the petition, estimate and affidavit shall, all three, be filed with and presented to the Board of Supervisors of the county. So, also, it will hardly be contended that the Commissioners, in the performance of the duty imposed by the fifth section of the act, to take possession of and keep under shelter, when not in use, all scrapers, plows and other tools belonging to their towns, can do no act in furtherance thereof, except it be at a regular or special meeting of the Board; and yet such taking possession of and keeping such tools is as much a part of the official business of the Commissioners as is making the estimate of probable cost of a bridge and swearing to the statutory affidavit. Just what the "official business" is that must be done at a regular or special meeting, and what the "official acts and proceedings" are that are required to be kept in the record book of the Board, it is wholly unnecessary now to specify. In our opinion there was no error in holding that the demurrer to the plea in question was well taken.

The 8th plea was to the effect that the relators had erected and completed the bridge without county aid, and that all expenditures and expenses in the building of said bridge was under and by direction of said Commissioners alone. The first replication to this plea was that after relators had

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presented their petition for aid to the County Board, they let the contract for building the bridge relying upon the aid asked of the county; that in pursuance of such contract the bridge had been built, and that one-half the expense thereof had been paid by the town, and the other half of the expense, to wit, the half to be met by the appropriation from the county treasury, was still due and unpaid.

The second replication was to the effect that the bridge was not erected without the county aid that had been asked for by relators, but was built on the faith and liability of the county to pay one-half the expense, and not on the credit and at the expense of the town alone. This case does not fall under the last *proviso* of Sec. 19, where, in certain cases of emergency, a bridge may be repaired or rebuilt, and the petition to the County Board may be presented during the progress of the work or after its completion. But, we do not understand the law to be that in all cases other than those of an emergency arising from sudden destruction or serious damages, it is absolutely essential that the County Board should actually appropriate from the county treasury a sum sufficient to meet one-half the expense of the proposed bridge, before such bridge can be built or the contract therefor let by the Commissioners.

The only conditions precedent that we find in the statute to the building of a bridge with county aid are, first, that the Commissioners shall present to the County Board such a petition for aid as is required by Sec. 19; second, the matters stated in the petition must be true; third, that before such bridge can be constructed under the provisions of said section, the commissioners must make a careful estimate of the probable cost of the same and attach thereto their affidavits that the same is necessary, and will not be made more expensive than is needed for the purpose desired; and fourth, such estimate and affidavit must be filed with the petition. It appears from the record before us that all these conditions were substantially complied with. The required papers were presented to the Board of Supervisors at their July meeting, 1886. The duty then devolved upon them to make the appropriation; the statute is mandatory, and they had no discretion to refuse the

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aid sought. The Commissioners having done all that was required of them, were authorized to proceed with the construction of the necessary bridge and rely upon the legal liability of the county to pay one-half the expense thereof; and the latter should not now be allowed to take advantage of its own wrong. There was no error in overruling the demurrer to the replications. All material facts that were alleged in the petition of the relators that were not traversed by the pleas of the defendants stood admitted upon the record. It was, therefore, unnecessary for the relators to prove or for the court or jury to find either that the cost of the bridge exceeded 20 cents on the \$100 on the last assessment roll of the town, or that the levy of the road and bridge tax for the year in said town of Rockville was for the full amount of 60 cents on each \$100.

The other objections urged by appellants against the judgment we regard as too unimportant and technical to require special attention; suffice it to say that, in our opinion, such objections are not well taken.

The peremptory writ of mandamus was properly awarded for the sum of 406.21, that being one-half of the actual cost of the construction of the bridge.

Finding no error in the record that should reverse, the judgment is affirmed.

Judgment affirmed.

JOSIAH DEYO
V.
EDWIN FERRIS.

Statute of Frauds—Right to Flow Water through Drain.

A parol agreement for a right to flow water through a ditch on another's land is void, such right being an interest in lands within the Statute of Frauds.

[Opinion filed December 9, 1887.]

Deyo v. Ferris.

APPEAL from the Circuit Court of Stark County; the Hon. S. S. PAGE, Judge, presiding.

Mr. MILES A. FULLER, for appellant.

Messrs. J. C. DECKER and C. C. WILSON, for appellee.

LACEY, J. This is the same case that was in this court and decided at its May term, 1886, (22 Ill. App. 154,) when this court held that the contract upon which the suit was brought was void under the Statute of Frauds and the cause was remanded to the court below.

That decision is referred to for a complete statement of the facts. At the March term, 1887, of the Circuit Court, the case was again tried and a judgment was again entered against appellant for \$75, the full amount of the original claim. From that judgment an appeal is again taken. The basis of the appellee's claim is this: The appellee and appellant are the owners of adjoining lands across which runs a wide swale unfit for cultivation without drainage; the appellee's is the lower heritance, and he had a ditch already completed across his land up to within about two rods of appellant's land. In the fall of 1882 the parties to this suit agreed between them that appellee should extend the ditch into appellant's land and the latter should pay him \$75. This contract was not reduced to writing.

We held when the case was here before, upon the evidence, that the subject of the contract was that in addition to the expense of extending the ditch about two rods onto appellant's land, the expense of which was trifling, it was in the contemplation of the parties that appellant should have the right of way for the flowage of the water from his land through the ditch of appellee on his land, and that this right was a part of the consideration of the contract. After a careful examination of the case and the law we held that a parol agreement concerning the right of way for flowage of water through a ditch on another's land is within the Statute of Frauds and void.

Hence it followed that the contract as a contract was void.

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We also intimated that there was a possible right of recovery on the part of appellee on the *quantum meruit* for the work and labor done by appellee at appellant's request, in digging the small portion of the ditch to and on the appellant's land.

We find the record of the evidence much the same as it was when the case was here before. Its main features are not changed. It is now insisted that appellee had left the two rods at the upper end of his ditch unexcavated for the purposes of a farm crossing, and that the \$75 was given him in part to compensate him for the expense of bridging the ditch. But this excuse can not avail for the reason that the bridge in itself was of no benefit to appellant, and he naturally would not want to pay \$75 for such expense unless he got the right of way, and the bridge has not yet been built. Appellee himself testifies that the proposition made by him to appellant was "to cut and extend the ditch through onto your land and make a good outlet for your tiling."

This proposition appellant accepted and the twenty or twenty-five feet on appellee's land and ten to fifteen feet "on-to appellant's" land was dug. The proposition presupposed the right of way over appellee's land for drainage for appellant's tiling, otherwise how could there be "a good outlet" for the latter's tile?

It is evident the verdict for \$75 can not be sustained.

This ought to have been manifest from the decision of this court when the case was here before.

For the error in not setting aside the verdict and granting a new trial, the judgment is reversed and the cause remanded.

Reversed and remanded.

Mann v. City of Elgin.

MICHAEL MANN

V.

CITY OF ELGIN.

Real Property—Purchaser of Lot, Bound by Description in Deed—Estoppel—Obstruction of Street—Ordinance—Time.

1. The purchaser of a lot is bound by the description contained in his deed, and is estopped from claiming more land than is therein described, or the plat as recorded showed to be free from an adjoining street, or that he knew or by reasonable inquiry might have known was not in the street.

2. Where a street or highway is dedicated by an individual to the public, and it appears beneficial and necessary to the public, acceptance will be presumed from slight circumstances.

3. In the case presented, the evidence shows that the defendant knew that one-half of a certain street was on the lot purchased by him.

[Opinion filed December 9, 1887.]

IN ERROR to the Circuit Court of Kane County; the Hon. C. W. UPTON, Judge, presiding.

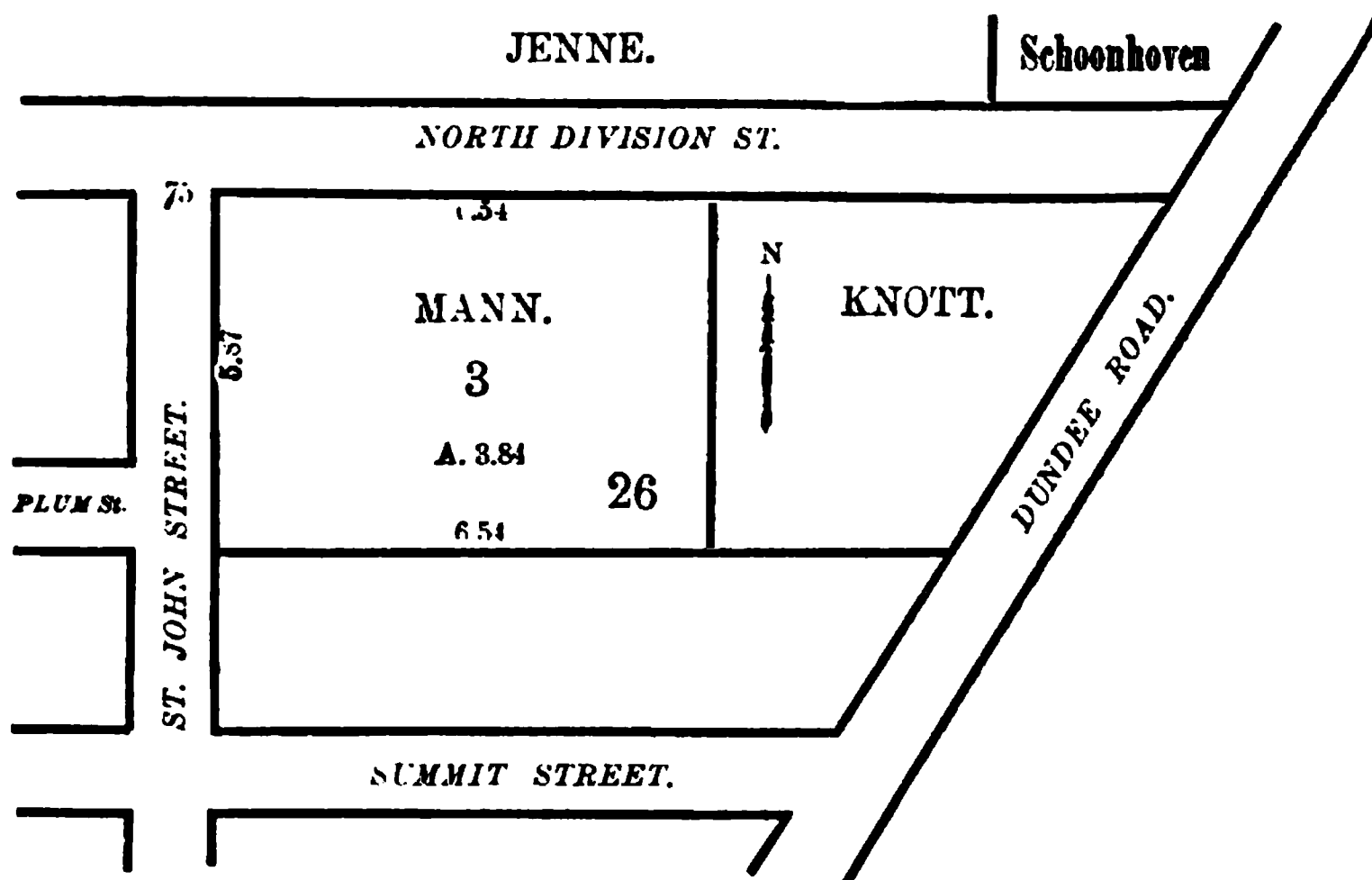
Mr. FRANK CROSBY, for plaintiff in error.

Messrs. BOTSFORD & WAYNE, for defendant in error.

LACEY, J. This was a suit commenced before a Justice of the Peace by appellee against appellant for violating an ordinance of the appellee in relation to the obstruction of streets.

The appellant, in the Circuit Court on trial, was fined in the sum of \$100. The cause was tried by a jury. One P. J. Kimball, Jr., was the owner of the premises on which the division of the city was afterward laid out, and one Jenne owned the land adjoining on the north. Kimball platted the land into lots and blocks with the necessary streets, leaving a street on the north three rods wide, and by agreement with Jenne one-half the width was on Jenne's land. The addition laid out was named and called P. J. Kimball, Jr.'s, 3d addition to Elgin, and a plat of it as recorded is as follows:

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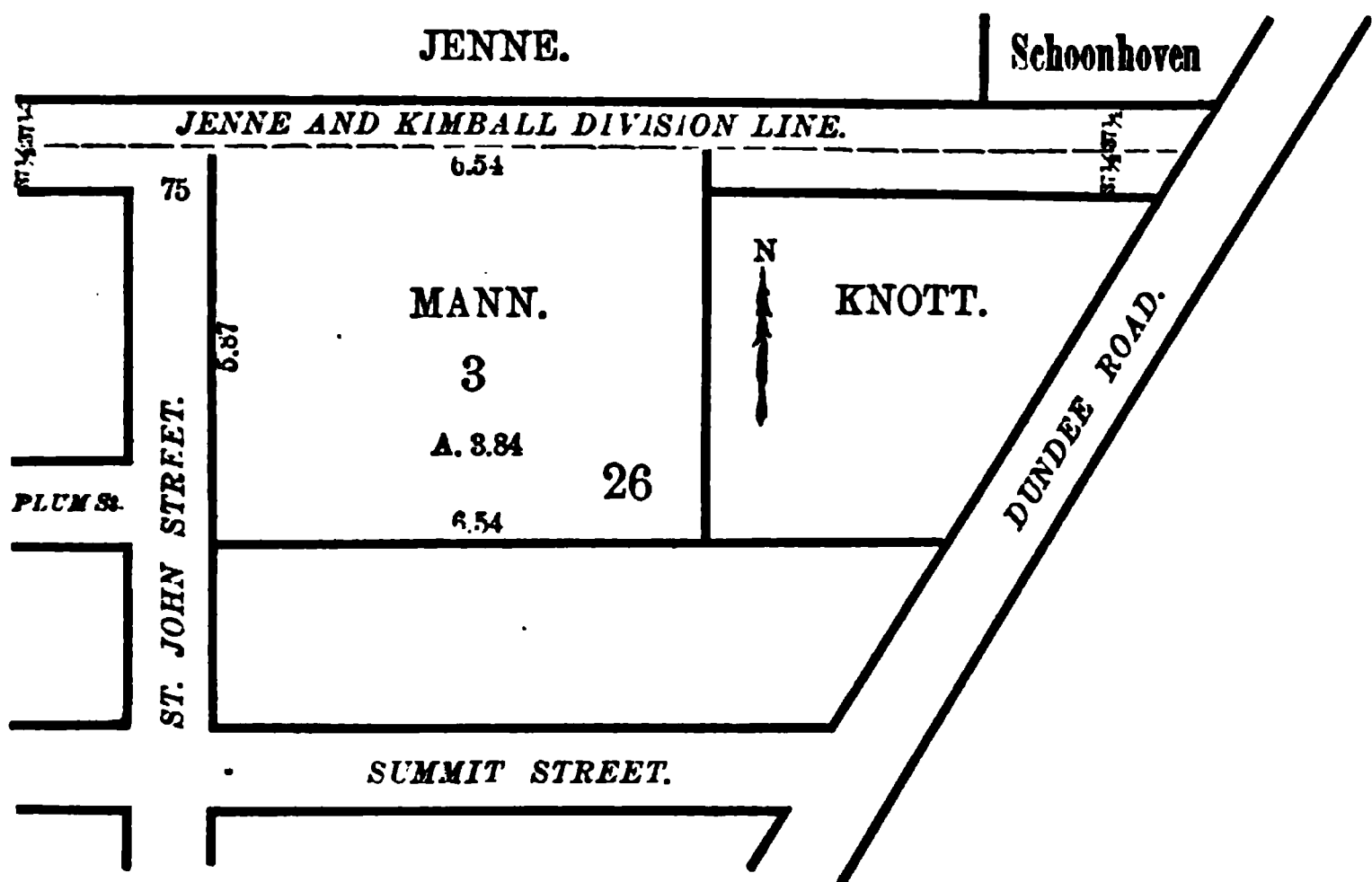


The street on the north was called North Division Street, and is the one that appellant is charged with obstructing. The original plat had no course or distance of North Division Street marked on it, but it had the width marked on it in several places, and also dotted lines running longitudinally through its center, marking the south line of Mrs. Jenne's land and the north line of P. J. Kimball, Jr.'s, land, and showing half the street to be on each; and as showing how wide the street was on each side of the dotted line, it was on the original map marked $37\frac{1}{2}$ links.

The obstruction complained of was the moving by appellant of his fence, north from the south line, as shown by the map, some 36 or 37 links to about the center of the street along its whole width.

The map showing the premises as represented by the original plat is hereto attached and showing it as now fenced.

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One Knott. owns the property immediately east in the same division, as will be seen by reference to the above plats, and about twenty years ago fenced it up, putting his north line fence on the south line of the street as platted off by the original plat, leaving $37\frac{1}{2}$ links or $1\frac{1}{2}$ rods of the width of the street south of Jenne's south line. There it has remained ever since. About seventeen years before the commencement of this suit, appellant having purchased his property from John Waite, who claimed through conveyances from Kimball, (appellant's deed bearing date May 14, 1868,) fenced it, setting his north fence on a line running west with that of Knott, leaving half of the width of the street on the Kimball addition, and one-half on Jenne's land, as the plat shows it was laid out.

The public had for seventeen years used and occupied the street as claimed by appellee. The appellant himself swears the travel has been confined to the street limits as now claimed for seventeen years.

The map, however, showed that the width of appellant's lot north and south was 5.87 chains, which, if it was of that width, would just about take the portion of the street as laid out by the map that was on Kimball's land. Discovering this

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fact, it appears, was the occasion of appellant moving his fence north into the street. It was evidently a mistake of the surveyor and platter of the map in not taking from the land the one-half the street left, and shown by the plat. The appellant moved his fence into the street, as it is claimed, so as to take in the strip of land claimed to be a portion of North Division Street, just before this suit was commenced.

It is objected that the mapping was not in compliance with the statute, and as to a portion of the signers, not properly signed, and hence the street was not legally conveyed to the public. We will not stop to inquire into that question, as we think the case can be disposed of without it. It appears that the deed from Waite to appellant conveyed to him the property by the following description, viz.: "Lot 3, Block 26, P. J. Kimball, Jr.'s, 3d Addition to Elgin as laid out and recorded." The appellant is bound by this deed and estopped from claiming any more land than the deed describes, or the plat as recorded showed was free from the street, or that appellant knew or might by reasonable inquiry have known was not in the street. At all events he must have known that 37½ links was reserved on the north side as a street. He built his fence accordingly and never claimed differently for over seventeen years.

The jury had a right to find from the circumstances that he had seen the original map, and seen the dotted lines and the width of the street marked thereon, also showing that half of the street was on lot 3. Mrs. Jenne had moved her fence north, leaving half the street.

The jury had abundant evidence for finding that there was half the street on his lot 3, and that he knew it at the time of his purchase. Under these circumstances he would be estopped from claiming to own any portion of the street, notwithstanding his lot did not hold out in width. Kimball, without doubt, intended to dedicate this strip of land, 37½ links wide, on the north line of his division, to the public for the purposes of a street.

All concurred, Kimball, Waite and appellant, in recognizing the rights of the public for seventeen years, and the public

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traveled and used the street for all the purposes of a street for that length of time. It does not appear that the street needed any repairs requiring the expenditure of money on it. Hence the only way the public could manifest its acceptance would be by using it for the purposes of travel, which it did. Where a street or highway is dedicated by an individual to the public, and such appears beneficial and necessary, as in this case, acceptance on the part of the public will be presumed from slight circumstances. There is abundant evidence in the record from which the jury might find an acceptance on the part of the public.

The map on which appellant's claim to title rests shows that lot 3 did not embrace the $37\frac{1}{2}$ links in width on the north side, and that was reserved for the purposes of a street.

If the map had not been definite enough, from which alone the land described therein could have been located, but the grantor had gone on the land and located it by the aid of the map and the grantor, such location would be binding on both parties, and the deed would have been good as to such location. By some means appellant ascertained what the proper location was, as appears from the way he fenced it, leaving out half the street; besides, the very map his lot is described by in his deed shows a street on the north, and the original map shows the width and the dividing line between Jenne and Kimball, Jr.

The jury, as we think, was fully justified in finding a verdict for appellee. The judgment is, therefore, affirmed.

Judgment affirmed.

MARGARET DUNN

V.

PICKARD BROTHERS.

Husband and Wife—"Family Expenses"—Sec. 15, Ch. 68, R. S.

A light farm wagon is not a family expense within the meaning of Sec. 15, Chap. 68, R. S.

Dunn v. Pickard Brothers.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Woodford County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. THOMAS KENNEDY and M. L. NEWELL, for appellant.

The law in question was passed by our Legislature March 30, 1874. Previous to this time, the Supreme Court of Iowa, from whence our law seems to have been taken, had held that a cook stove and fixtures used in the family (*Finn v. Rose*, 12 Iowa, 567) and provisions and clothing (*Hawke v. Urban*, 18 Iowa, 83) were family expenses under the law. Since then it has been held by the same court that a piano (*Smedly v. Felt*, 41 Iowa, 588), a lady's gold watch and chain (*Marquardt v. Flangher*, 60 Iowa, 148), an organ (*Frost v. Baker*, 65 Iowa, 178), a sewing machine (3 N. W. R. 670), when used in the family under the rule stated in *Smedly v. Felt*, 41 Iowa, and followed by our court in *Van Platen v. Krueger*, 11 Ill. App. 627, were proper expenses under the statute. It has also held under the same rule that a reaping machine (*McCormick v. Muth*, 49 Iowa, 536), merchandise and live-stock, also a breaking plow (*Russell v. Long*, 52 Iowa, 250), money borrowed to pay family expenses (*Davis v. Richey*, 55 Iowa, 719), attorneys' fees, etc. (*Fitzgerald v. McCarty*, 55 Iowa, 702), and the expenses of an insane wife in a hospital (*Delaware County v. McDawell*, 46 Iowa, 170), were not family expenses under the law.

So far as we are able to find, only such articles as are used in the dwelling house seem to have been held to be "family expenses" under the law. The line seems to have been drawn at the threshold.

Our Appellate Court in *Van Platen v. Krueger*, 11 Ill. App. 627, hold the words "expenses of the family" mean such expenses as were incurred for, on account of, and to be used in the family; and what would be included in the term must, within the above limitation, be determined by the circumstances of each case.

Mr. JAMES A. RILEY, for appellees.

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“The statute does not limit the liability of the property of the wife to expenditures for necessary family expenses. It applies to the expenses of the family, without limitation or qualification as to kind or amount.” *Van Platen v. Krueger*, 11 Ill. App. 629. And again, “if the courts should undertake to classify family expenses into those which are and those which are not a charge upon the property of both husband and wife, they would soon find themselves involved in an intricate and uncertain maze.” *Id.*

If a banker or business man in the city buys a horse and buggy, that his family may ride around in, and if it is used by them for their pleasure and enjoyment, is not that as much of a family expense as a piano (*Smedley v. Felt*, 41 Iowa, 588) in the house, or a lady's gold watch and chain? *Marquardt v. Flangher*, 60 Iowa, 148.

This court has held that the statute applies for the expenses of the family, without limitation or qualification as to kind or amount. *Van Platen v. Krueger*, 11 Ill. App. 627. So with this buggy; even if it had been proven to be a large, strong one, it might still be a family expense. If it were purchased for and used in Dunn's family, it is a family expense. *Finn v. Rose*, 12 Iowa, 565. The jury were justified in saying, after considering all the evidence, that this buggy was purchased for and used in Dunn's family, and the verdict was manifestly in accordance with the evidence.

LACEY, J. This suit was brought by appellees originally before a Justice of the Peace, to recover of appellant the price, \$77.50, of a two-horse, double-seated buggy, sold by the appellees, dealers in such articles, to the husband of the appellant in 1882. The suit was appealed to the Circuit Court and there again tried and judgment rendered against appellant for the amount of the claim, from which judgment this appeal is taken. The husband, to whom the buggy was sold, died before the appellant was sued, and his estate was administered upon by appellant and she took the buggy as a part of her award.

The right to recover in this case is claimed by appellees,

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under Sec. 15 of the act relating to husband and wife, as follows :

“The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor and in relation thereto they may be sued jointly or separately.” The above statute is a copy of a statute previously passed in the State of Iowa, and to the interpretations given to it by the courts of that State, prior to its adoption in this State we should, in a great measure, look for light as to its meaning. The proper solution of the question presented in this case will depend on what is meant in the said act by the term, “*expenses of the family.*”

{ This term certainly does not cover every species of articles bought which goes directly or remotely to the support of and for the benefit of the family. If such were the case there would scarcely be an article purchased that would not come within that term, “family expenses.”

{ Farming implements of the farmer and the tools of the mechanic are generally used to make money for the benefit of the family, yet it would hardly be contended that such articles would be for family expenses. Anything that is used as a general thing to carry on the farm of a farmer or the trade of a tradesman or mechanic, are not to be regarded as family expenses within the meaning of the statute. The Supreme Court of the State of Iowa has held that a cook stove and fixtures used in the family, provisions and clothing, a piano, a lady's gold watch and chain, an organ, a sewing machine when used in the family, are expenses of the family within the meaning of the statute. *Fun v. Rose*, 12 Ia. 567; *Hawke v. Urban*, 18 Ia. 83; *Smedley v. Felt*, 41 Ia. 588; *Marquardt v. Flangher*, 60 Ia. 148; *Frost v. Baker*, 65 Ia. 178.

It has also been held by the same court that a reaping machine, merchandise and live stock and a breaking plow, money borrowed to pay family expenses, attorneys' fees, and the expenses of an insane wife in a hospital, were not family expenses under the law. *McCormick v. Muth*, 49 Ia. 536; *Russell v. Long*, 52 Ia. 250; *Davis v. Ritchie*, 55 Ia. 719; *Fitz-*

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gerald v. McCarty, 55 Ia. 702; Delaware Co. v. McDawell, 46 Ia. 170.

After a careful reading of the evidence in the case we conclude that the buggy in question comes more fairly under the class of the articles last above decided. The buggy was a strong one and after taking out the hind seat, was very suitable for use as a light wagon around the farm and going to and from market, taking articles to market and bringing back articles for use of family or otherwise, and for use as a general "hack" wagon, and it was generally used as a light wagon on the farm. The husband in his lifetime was a farmer engaged on the farm where he resided with his family. He had but one span of horses and one set of harness. Those horses and harness were exclusively used to the buggy. The evidence clearly shows that the buggy was used in no other way than as a general light wagon on a farm. The family may have, and sometimes did, use the buggy to ride in to church and town and other places, so they might do in a two-horse heavy wagon, but that would not change the character of the use of the wagon, and justify a recovery from the wife on account of its purchase by the husband under the head of family expense. It would hardly be claimed that the outlay for a common two-horse wagon, used for all work, even to cart the family to church, town or other places, should be classed in "family expenses." It would occupy the same place as the reaping machine and money borrowed to pay family expenses.

We do not think the law, by judicial construction, should be extended to cover cases under the head of "family expenses" not fairly within the meaning of the statute. The courts of Iowa have gone as far in that direction as a very liberal construction of the statute would warrant. The evidence in this case is not conflicting, and, we think, fails to support the verdict. The judgment of the court below is, therefore, reversed and the cause remanded.

Reversed and remanded.

Bannon v. Thayer.

PATRICK R. BANNON, IMPL'D, ETC.

V.

H. L. THAYER ET AL.

Mechanic's Lien--Parties--Trust Deed--Foreclosure.

1. In a proceeding to enforce a mechanic's lien on property covered by a trust deed, the holder of the notes secured thereby and the trustee should be made parties defendant, or such holder will not be bound.

2. In the case presented, the evidence shows that the holder of the lien was in possession of facts as to the ownership of the note sufficient to put him on inquiry.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Will County; the Hon. DORRENCE DIBELL, Judge, presiding.

Messrs. HALEY & O'DONNELL, for appellant.

Mr. C. W. BROWN, for appellees.

LACEY, J. This was a bill in equity commenced by appellee against appellant to foreclose a certain trust deed dated May 8, 1882, executed by James Beanly and wife to George Woodruff, trustee, conveying to said Woodruff certain lots in the City of Joliet in trust to secure the sum of \$1,000, represented by a promissory note executed by said Beanly to himself, of the same date, with interest at the rate of eight per cent. per annum, and by him indorsed to Miss A. I. Wheeler. Beanly borrowed the money. The note was due three years after date with the interest payable semi-annually. The mortgage was duly recorded of the date it bears date.

The said trust deed provided that in case of the death of the said Woodruff, trustee, then H. L. Thayer should be his successor in trust; and said Woodruff died October 26, 1882, whereby the trust devolved on Thayer. The note was indorsed to Charles Thayer, but was the property in fact of appellee. The defense set up to the foreclosure by the appellant was ownership of the property by paramount title to it,

by virtue of a master's deed duly executed to him, he being a purchaser of the property at master's sale, which was had by virtue of a decree of the Will County Circuit Court, rendered in a mechanic's lien suit wherein appellant was complainant, and James Beanly, Ann Beanly and George Woodruff were defendants; that after the commencement of the proceedings, George Woodruff died; that whatever interest appellee had to the property was subject to the rights of Bannon, the appellant. The mechanic's lien foreclosed by appellant against James Beanly was for lumber and material for building two buildings on the real estate in question, the amount thereof being \$790.48, was a lien on the property prior to the execution of the trust deed. At the time the mechanic's lien suit was commenced James Beanly had become insane. Appellee became the purchaser of the note in this suit after the decree in the mechanic's lien suit was rendered, from Miss Wheeler. Neither Miss Wheeler, the holder of the note, nor appellee was made party to the mechanic's lien suit. The question presented in this record is, was the mechanic's lien foreclosure binding on Miss Wheeler, the then holder of the note, she not having been made a party to the foreclosure suit, and after the death of Woodruff appellee not being made a party. Unless there was something exceptional in this case to take it out of the operation of the general rule, the holder of the note secured by the trust deed would not be bound by the decree in the mechanic's lien foreclosure. In such case the appellant's lien, by virtue of the mechanic's lien law against the note in question, would be lost, as more than six months had expired after the money for the materials had become due, and before the holder of the note secured by the trust deed had been made a party or before this suit was commenced. *Dunphy v. Riddle*, 86 Ill. 22; *McGraw et al. v. Bayard*, 96 Ill. 146. In the last above cited case it is held that in a case where the trustee is the mere agent to collect the note described in the trust deed, both the *trustee* and the *cestui que trust* must be made parties where their interest in the real estate is sought to be affected, otherwise their rights will not be affected by the foreclosure. In this case neither appellee was made a party after the death of Woodruff nor Miss Wheeler, the then owner of the note.

Bannon v. Thayer.

Unless there is something in this case that would take it out of the operation of the general rule, the decree of the court below should be affirmed. Counsel for appellant admits this, but he insists, however, that the appellant was excused from not making them parties, for the following reason: appellant was not in possession of facts that would reasonably put him on inquiry that Miss Wheeler was the holder of the note, nor did he know it, as a matter of fact.

We do not think that this excuse is available. The appellant had heard that the note, although payable to Beanly, had been indorsed or transferred by him for borrowed money, and he so far recognized the fact as to make Woodruff, the trustee mentioned in the trust deed, a party. The trust deed itself was on record, and was seen by the appellant's attorneys before the suit was commenced. This disclosed that appellee was also named trustee in the event of Woodruff's death.

Under the circumstances, the appellant should have inquired of appellee, as well as Woodruff, if the latter did not give the desired information. He could have inquired of Mrs. Beanly, who was one of the signers of the trust deed, and the fact that he was not on good terms with her would not excuse him. He could have procured his attorneys to make the inquiry. Then, if Beanly himself had been asked about it, he might not have been so insane but that he could have given the information. The person who took the acknowledgment of the deed was not inquired of. After the death of Woodruff, appellee became, by virtue of the trust deed, the trustee; the case had not yet proceeded to decree, and the appellee should have been made a party. If the *cestui que trust* could not have been ascertained, then she might have been made a party, under Sec. 9, Chap. 22, R. S., by the name of the "unknown holder of the note described in the trust deed." None of these things were done, the appellant and his attorneys seeming to think that it was sufficient if the trustee, at the time the suit was commenced, was made a party.

Seeing no reason for any exception in this case to take it out of the operation of the general rule, the decree is affirmed.

Decree affirmed.

Wooley v. Wooley.

24 431
60 362CHARLES WOOLEY
v.
MINERVA E. WOOLEY.

Divorce—Alimony Pendente Lite—Allowance of Gross Sum—Solicitor's Fees—Discretion—Desertion.

1. The exercise of the power to make allowances to the wife, pending a bill for divorce, for the support, during the litigation, of herself and the children in her custody and care, and for the payment of her solicitor's fees and other expenses of suit, is within the judicial discretion of the court wherein such bill is pending. In such cases this court will not interfere, unless there has been an abuse of discretion.

2. The power to require the husband to pay alimony *pendente lite* is not affected by the statutory right of the wife to control her separate property and to enjoy her own earnings.

3. The allowance of alimony *pendente lite* does not depend upon the wife's absolute right to a divorce. She is only required to show probable ground for a divorce. The court will not, upon a preliminary motion and upon *ex parte* and contradictory affidavits, undertake to determine the issues presented by the pleadings.

4. Under some circumstances, a gross sum for temporary alimony and support may be allowed.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Kendall County; the Hon. C. W. UPTON, Judge, presiding.

Mr. CHARLES WHEATON, for appellant.

Messrs. HOPKINS, ALDRICH & THATCHER, and P. C. HAWLEY, for appellee.

BAKER, J. On the 23d day of June, 1885, Minerva E. Wooley exhibited her bill, for a divorce, against Charles Wooley, her husband, charging him with extreme and repeated cruelty. He filed an answer denying the charges in the bill, and also filed a cross-bill for a divorce, in which he charged that his wife had wilfully and without any reasonable cause

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deserted him for more than two years, and alleged that she, on or about the first of June, 1882, wholly disregarding her marriage vows, and without any cause, had left his bed and wholly refused to cohabit with him, and from that time and for more than three years last past, had refused to sleep with and cohabit with him, and continued so to refuse until June 10, 1885, when she, without any cause, left his house and home, and abandoned him. The substance of the answer of the wife to the cross-bill was that she had refused to sleep or have sexual intercourse with her husband for over three years for the reason he had a venereal disease and she was afraid of contracting such disease, and also on account of his extreme and repeated cruelty to her. In respect to the matter of a refusal of copula amounting to desertion, reference may be had to 1 Bishop on Marriage and Divorce (5th edition), Secs. 778 to 782, inclusive.

On the 19th day of January, 1887, the Circuit Court, upon the petition of the wife for temporary support and alimony *pendente lite*, and for money to pay expenses of litigation and solicitors' fees, decreed that the husband, within sixty days, pay to the wife, or to the clerk of the court for her use, the sum of \$300, for her support and the support of the two minor children of the parties to the suit, who then were and ever since the filing of the original bill had been living with her, and to enable her to prepare her cause for trial, and further decreed that he, within the same period, pay \$200 to her solicitors on account of their fees in the litigation.

The present appeal is from this order of the court for alimony *pendente lite* and for solicitors' fees.

The fifteenth section of the Divorce Act provides that in all cases of divorce the court may require the husband to pay to the wife or pay into court for her use during the pendency of the suit, such sum or sums of money as may enable her to maintain or defend the suit; and that in every suit for a divorce, the wife, when it is just and equitable, shall be entitled to alimony during the pendency of the suit. The thirteenth section provides that the court may make such order concerning the custody and care of minor children of the

parties during the pendency of the suit as may be deemed expedient, and for the benefit of the children.

The exercise of the power to make allowances to a wife, pending a bill for divorce, for the support during the litigation of herself and the children in her custody and care, and for the payment of her solicitors' fees and other expenses of suit, is a matter that is left to the judicial discretion of the court in which the bill is pending; and appellate tribunals are not warranted in disturbing the decree of such court in that regard unless the circumstances are such as to quite clearly indicate there has been an abuse of discretion. *Foss v. Foss* 100 Ill. 576.

The ground is taken by appellant that no alimony whatever should have been given to appellee. It is urged that since the present statute, concerning husband and wife, went in force, giving the wife control of her separate property and the benefit of her own earnings, the husband is under no obligation to support the wife when she ceases to cohabit with him. A sufficient answer to the elaborate argument made by counsel in that behalf is found in the fact that the power to require the husband to pay alimony during the pendency of the suit is expressly conferred by the statute. Nor does the allowance of temporary alimony depend upon the wife's absolute right to a divorce; probable ground for a divorce is all that she is required to show. *Jenkins v. Jenkins*, 91 Ill. 167. This probable ground for a divorce was shown upon the hearing of the motion by the affidavit of appellee herself and the affidavits of several other persons who were intimate with the family and well acquainted with the relations that had existed for a long space of time between her and her husband, and their conduct toward each other. The fact a large number of counter affidavits were filed does not necessarily show the order for alimony was improperly made. The court could not assume upon a preliminary motion and upon *ex parte* and contradictory affidavits to determine the issues made upon the bills and answers. Waiving any question in respect to the sufficiency of the allegations of the cross-bill to entitle appellant to a divorce, it would seem the answer of appellee

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thereto sets up good and sufficient cause for refusing to have sexual intercourse with appellant.

It is further urged that giving appellee \$300, in gross, for temporary alimony and support was erroneous. *Von Glahn v. Von Glahn*, 46 Ill. 134; *Keating v. Keating*, 48 Ill. 241; *Ross v. Ross*, 78 Ill. 402, and *Shaw v. Shaw*, 114 Ill. 586, cited by appellant, were all cases of decrees for alimony entered under the provisions of section 18 of the Divorce Act, upon the rendition of final decrees for divorce. The general rule is that alimony should consist of a stated amount to be paid at fixed periods, either annually, semi-annually, quarterly, monthly or weekly, as the court may deem most advisable. In exceptional or special cases, the fee of real property of the husband, or a life estate in such property, or a sum of money in gross, may be awarded as alimony. *Armstrong v. Armstrong*, 35 Ill. 109; *Dinet v. Eigenmann*, 80 Ill. 274. In case of an allowance for mere alimony *pendente lite* it would be absurd to suppose a court would vest in the wife either the fee of the husband's real property or a life estate therein. Instances, however, quite frequently arise in applications by the wife during the pendency of suit for divorce, for an allowance to pay the expenses of litigation and of temporary support, when it is eminently just and equitable that the allowance made should be a sum of money in gross. We are not prepared to hold that the present is not such a case. Appellee was in poor health and unable to earn a livelihood for either herself or the two children who were in her charge; one of these children was about nine and the other about seven years of age at the hearing of the motion; and the husband had at that time provided nothing for either her or their support for over eighteen months. She had no money, property or means of her own, unless it be the property rights which she claimed in her bill, and which were in the possession and control and stood in the name of her husband. It appeared that many of her witnesses resided out of the county in which the suit was pending, and that it would require at least \$50 to take their depositions or procure their attendance at court. Deducting this \$50 from the amount adjudged by the court to be paid to her, it would leave less than \$14 per month to pay for the sup-

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port and maintenance of herself and two children during the time that had already elapsed since the filing of the original bill. Appellant was the owner of a farm containing two hundred and forty-eight acres of land, worth from \$40 to \$50 an acre; and according to his own admission he was worth \$6,400 over and above his indebtedness. Under the circumstances of the case, we think it was eminently proper to make an allowance of \$300 in gross, in order to enable the wife to prepare her case for trial and pay the expenses of the maintenance of herself and children. She had already, at the time of the decree, been vainly endeavoring for a year or more to obtain an order for temporary pecuniary relief.

It is also claimed that the allowance of \$200 for solicitor's fees was excessive. We do not so regard it—either from the standpoint of the financial condition of appellant, or from that of the character and extent of the legal services then already performed and that would thereafter be required. At the time of the decree for alimony and solicitors' fees the divorce suit had been pending in the court for more than eighteen months, and although no trial upon the merits of the cause had been reached, yet numerous hotly contested controversies had arisen in the course of the litigation and had been settled by orders made both in term and in vacation, and a voluminous record of some 200 pages already made.

We find no error in the record, and the order and decree of the Circuit Court is affirmed.

Affirmed.

KINGMAN & COMPANY
v.
STEPHEN MARTIN ET AL.

Sales—Exclusive Territory—Warranty—Breach—Damages.

The warranty in a contract, guaranteeing the exclusive sale of a machine within a certain territory, is not broken by the sale within said territory of a different machine manufactured by a third party under the same patent.

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[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. KELLOGG & CAMERON, for appellant.

The damages for a breach of contract are confined to such as the parties must have contemplated at the time it was entered into, speculative or remote damages being excluded. *Green v. Mann*, 11 Ill. 613; *Haven v. Wakefield*, 39 Ill. 509; *S. & M. R. R. Co. v. Henry*, 14 Ill. 156; *Priestly v. N. Ind. & C. R. R. Co.*, 26 Ill. 205; *Olmstead v. Burke*, 25 Ill. 86; *Frazier v. Smith*, 60 Ill. 145; *Hiner v. Richter*, 51 Ill. 299; *Greene v. Williams*, 45 Ill. 206; *C., B. & Q. R. R. v. Hale*, 83 Ill. 360; *I. C. R. R. Co. v. Cobb*, 64 Ill. 146; *Moline Water Power Co. v. Waters*, 10 Ill. App. 159.

Messrs. STEVENS, LEE & HORTON, for appellees.

LACEY, J. Appellant, being a corporation, sold, by written contract, to appellees, 400 of Strowbridge broadcast seeders, manufactured by Stephen Freeman & Sons, Wisconsin, on the 31st day of October, A. D. 1885. One hundred and twenty-five dollars was acknowledged to be paid by the contract, leaving balance due \$1,334.59 for the remaining seeders and other small matters.

By the terms of the same contract and as a part of its provisions the appellant guaranteed the exclusive sale of the above named seeders in certain territory mentioned therein in the State of Illinois. The seeders were delivered under the contract. Appellees pleaded a set-off, claiming a breach of the guaranty and damages resulting therefrom, in that other seeders of the said kind were sold in the limits of the territory mentioned in the contract.

The court below allowed proof to go to the jury over the objection of appellant, showing that the Strowbridge broadcast seeder, manufactured by the "Racine Manufacturing Company, Wisconsin," was sold in said territory, a different machine

from the one made by Stephen Freeman & Sons and not so well made and not so good, construing the warranty to extend to all "machines made under the same patent by whomsoever manufactured," and also proof of resulting damages.

By this means the appellees procured a set-off in the verdict of the jury to the amount of \$690.

The question presented here is whether the court erred in the construction of the contract. We are of the opinion that the ruling was erroneous.

There were no Strowbridge broadcast seeders manufactured by *Stephen Freeman & Sons*, sold in the territory to which the warranty extended other than the ones sold by appellees and no pretense of any breach of the warranty unless this proof was competent.

To give the contract such a construction was enlarging and extending the warranty beyond either the letter or spirit of the contract. Parties have a right to make such a contract as they choose and it is the duty of courts to enforce them as made. The Racine Manufacturing Company was organized in 1883 and failed in 1885, before June the 4th of that year. Stephen Freeman & Sons then organized and manufactured the machine sold and mentioned in the contract in question on an improved scale, and advertised it as the "Freeman Broadcast Improved Seeder." The Racine seeder was spoken of between appellant and appellees as an inferior machine. The difference in the machine was well understood.

If the appellant had offered to deliver any other machine than the one manufactured by Stephen Freeman & Sons, would appellees have been compelled to accept it under the contract? Clearly not.

Even if there had been no difference save the name and brand they would have a right to demand the identical article bought, not an equivalent one. And in like manner the machine mentioned in the contract was the only one appellants guaranteed should not be sold in the prescribed territory.

There were some other minor errors but for this fatal one the judgment is reversed and the cause remanded.

Reversed and remanded.

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CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

V.

CHARLOTTE BLANK, ADMINISTRATRIX.

Railroads—Action for Damages for Causing Death of Employee—Negligence of Conductor—Liability of Defendant—Instructions—Fellow-Servants.

1. Where an employe who has control over other servants of the same master, with power to hire and discharge them, gives a negligent order to one of such servants, who, in obeying, causes injury to another of them, the master is liable for the damages.

2. An instruction which is not based on the evidence or which raises an irrelevant issue, should not be given.

3. In an action against a railroad company to recover damages for causing the death of an employe while engaged on a gravel train, it is *held*: That the negligence of the conductor is sufficiently stated in the declaration, it being sufficient to aver negligence in general terms; that the evidence sustains the charge of negligence contained in the declaration; that the evidence does not show negligence on the part of the engineer; that there was no error in modifying certain of the defendant's instructions; and that the allowance of \$2,150 as damages was not excessive.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Henry County; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

Messrs. H. BIGELOW, CHARLES K. LADD and O. F. PRICE, for appellant.

Appellant's first instruction asked, assumed as matter of law that the conductor, engineer, fireman, brakeman and all other persons engaged with the train in transporting gravel, were fellow-servants, and if they were, the instruction should have been given without modification, since the modification left it to the jury to find as a matter of fact whether they were fellow-servants or not.

The conductor, with all of the persons engaged on the train, were working in the same place, to subserve the same interests, and with their occupation so related to each other that

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the safety of one necessarily depended to a greater or less extent upon the care of the others, and hence were fellow-servants. C. & A. R. R. Co. v. Murphy, 53 Ill. 336; Valtez v. O. & M. R'y Co., 85 Ill. 500.

One of the tests laid down by our Supreme Court by which to determine whether a person who is injured is a fellow-servant with the one whose negligence is the proximate cause of the injury, is, to inquire if both are engaged in the same *line of employment*, and by this is meant the forwarding of an immediate common purpose in which both are directly engaged. C., B. & Q. R. R. v. Gregory, 58 Ill. 272; Ryan v. C. & N. W. R. R. Co., 60 Ill. 171; P., Ft. W. & C. R. R. v. Powers, 74 Ill. 341.

Mr. C. C. WILSON, for appellee.

The master is liable for an injury to a servant resulting from the orders of a superintendent or other employe or agent having the supervision of the work, and power to employ, direct and discharge laborers. Lalor v. C., B. & Q. R. R. Co., 52 Ill. 401; Gormly v. Vulcan Iron Works, 61 Mo. 492; C. & A. R. R. Co. v. May, 108 Ill. 288, and cases there cited; Grayville v. Minneapolis & St. L. R'y Co., 10 Fed. Rep. 711; Gilmore v. Northern Pac. R'y Co., 18 Fed. Rep. 866; Corcoran v. Holbrook, 59 N. Y. 517; Mullan v. Steamship Co., 78 Pa. St. 25; Mitchell v. Robinson, 80 Ind. 281; Patterson v. Pittsburg & C. R. Co., 76 Pa. St. 339; Ford v. Fitchburg R. Co., 110 Mass. 240; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377; Cowles v. Richmond & D. R. Co., 84 N. C. 309; Lake Shore & M. S. R'y Co. v. Lavalley, 36 Ohio St. 221.

The employer is liable for the negligence of a superior servant whose orders the injured servant is required to obey, which causes injury to another employe, even though he be in the same general line of employment. Berea Stone Co. v. Kraft, 31 Ohio St. 287; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; Pittsburg, Ft. W. & C. R'y Co. v. Devinney, 17 Ohio St. 197; Galveston, etc., R. Co. v. Delahunty, 53 Tex. 206.

The question, what were the powers of William Henry, the

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conductor, and how far he stood in the company's place and represented it to the men, is one of fact only, that is conclusively settled by the verdict. *T., W. & W. R'y Co. v. Moore*, 77 Ill. 217; *C., B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272, 284; *Mullen v Steamship Co.*, 78 Pa. St. 25; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Delaware & Hudson Canal Co. v. Carroll*, 89 Pa. St. 374.

LACEY, J. The deceased, Henry Blank, with a gang of men numbering about twenty-seven, in November, 1886, was engaged in loading gravel on the cars of appellant, in the County of Bureau, under the control and direction of Wm. Henry, who was conductor of the train in the employ of appellant. The gravel bank from which the gravel was being taken was situated on the Buda and Rushville branch of the appellant's road, about three miles north of Buda, in Bureau County. A switch from the branch line runs from a point a little north, from and to the gravel pit. The train usually backs down from Buda to the gravel pit. The train, on the day of the accident, consisted of twenty-two gravel or flat cars, and a caboose or way car, and started to back down from Buda to the gravel pit. The caboose or way car, in which the men were riding, was at the south end of the train, but the caboose car could not be shoved into the gravel pit, it being wider than the space would permit. It was necessary to have it on the main track, south of the switch, till the flat cars could be shoved into the pit, and then the engine would return and get it, to attach it to the north end of the train.

While the caboose was being backed up, a quarter of a mile before it reached the switch, the conductor, Henry, ordered the men to leave the way car and to get onto the flat car, which they all did, and about the time the last of the men were making the change, the deceased among them, the conductor ordered the brakeman to pull the pin that coupled the way car to the rest of the train, and then the signal was given to the engineer to set the air-brake on the engine, which the latter did, in obedience to the signal. This had the effect, as it was designed to have, to cause the slack to be taken up in

the train, which in the whole train would be about the length of a car, and to slow up the main train and permit the way car to go ahead and leave the main train, and to pass the switch on the main track. By setting the air-brakes after the slack was taken up, a considerable shock or jerking of the flat cars would be experienced, which happened in this instance. The signal to set the brakes and shock came just about the time deceased and some of the other men were stepping on the hind end of the flat car, next the way car, and the jar threw the deceased and another man by the name of Rasmussen off of the end of the flat car, and they both fell on the track, and six or seven of the flat cars ran over and killed them, and for the damage to the means of support of the widow and next of kin of deceased, this suit is brought.

The gravamen of the charge in the declaration is that the conductor, Henry, as the agent of the appellant, was negligent in giving the order to the engineer to set the air-brakes before the deceased had time to get on the flat cars after being so ordered by him, and before he had time to get so placed as to guard against the danger of being thrown from the car in the manner in which he was. The deceased was one of the gravel shovelers, and it is claimed and averred in the declaration that he was at the time in the exercise of ordinary care for his own safety. It was averred that appellant's conductor gave deceased no notice that he was about to cut off the way car, but caused the uncoupling to be done in a violent and reckless manner. There was a verdict and judgment for appellee for the sum of \$2,150, from which this appeal is taken.

The evidence given in the case by the appellee tended to show that after the orders were given to the men to change from the way car to the flat car the conductor did not give time for all the men to get from the one car to the other, but that the deceased and a couple of the other men had not got over before the coupling pin was pulled by order of the conductor and the signal given to the engineer to slack, which he did just as deceased had stepped onto the flat car but had not had time to straighten up before the shock came and threw him off, when he was killed. According to the appellee's evidence

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it was a case of very gross carelessness in the conductor and caused the death of two men.

The evidence for defendant goes to modify this somewhat and tends to show that appellee's decedent would have had time and did have time to get out of the way of danger between the time the order to change cars was given and the shock; that the coupling pin was not drawn till after all had gotten safely aboard the flat car, and from the custom all knew the coupling was to be made that way and should have guarded against accident occurring from the jerking of the cars caused by setting the air-brakes.

But even the evidence on the part of appellant shows that the time for the men to get on the flat car and get settled was very short before the air-brakes were set and the shock came. We are satisfied from the whole evidence that the jury were justified in finding the appellant guilty of negligence in the manner charged in the declaration.

It is, as we understand it, not contended in the appellant's argument in chief that the verdict was against the weight of the evidence unless on the point that it shows that the conductor and deceased occupied the relation of co-employees of a common master. In the reply brief it is claimed, however, that the cause of the accident was deceased's own carelessness, and that the jury was prejudiced in giving its verdict. The declaration is broad enough in its averments to charge negligence on the part of the conductor in giving the order to uncouple and to take up the slack or set the air-brakes, and that the injury resulted in consequence.

There are several distinct facts set out in the declaration as having been done by the conductor, a portion of which relates to the manner and time of giving the order, and the declaration further avers that "the orders of the said conductor were given by him and the cars cut off and moved as aforesaid in a careless and negligent manner and in the total disregard of the safety of said Blank and other laborers on the train and without any caution to him, said Blank." That by reason of the *said orders by the said conductor*, the said way car and flat cars

were suddenly separated and violently jerked and moved in an unusual, violent and reckless manner, causing said deceased to fall from the car, etc. The accident is stated to be caused by the violent jerking of the cars and throwing deceased under them by that means; but the cause of deceased being in a position to be injured when the shock came was, as is claimed, the order given in negligent manner, by being at a wrong time, without notice, and sooner than had usually been the custom, and sooner than deceased had a right to expect, and before he could guard against it. The manner of the negligence need not be fully stated in the declaration; it is sufficient to aver negligence in general terms. The manner of jerking of the cars was stated to be negligent and caused by the conductor's negligent order. That is one of the points of negligence stated but it is not necessary to prove every averment as stated, so that enough of the charge is proven to make out a case.

The proof shows that there was always more or less jerking in slowing up, and enough to make it dangerous for a man standing on the cars unguarded and unprepared for it.

We think the declaration is sufficient and not obnoxious to the charges made against it by counsel for appellant. It amounts to a charge that the conductor negligently, under the surrounding circumstances, gave an order to slack up the train and thereby set in operation causes that reasonably might have been foreseen would, and actually did, result in the death of deceased. There is no charge in the declaration that the death of Blank was caused by any negligence of the engineer who set the air-brakes. Nor is there any claim in the instructions given for appellee that there was any right of recovery except from the proof that the conductor gave the negligent orders to slack the train as he did.

Nor do we think the third of appellee's instructions is erroneous in stating "that if the conductor gave general directions to the brakeman in regard to cutting off the way car, and on the occasion in question was present and saw the brakeman pull the coupling pin and signal to the engineer to slow up, it made no difference; it was the same as though he did it himself."

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The evidence tended to show that he had given general directions to the brakeman to make the signals to slow up the train and at the time the signal was given was present and ordered the uncoupling and did not object to the signal being given at that time. This is equivalent to giving the signal himself. The question of the liability of the appellant on the case stated in the declaration is not an open one in this State. Where an employe of a master having control over other servants of the same master, with the power to hire and discharge them, while engaged in some work of the master gives a negligent order to one of such servants, who, in obeying, causes injury to another of such servants, the common master is responsible for the damages done. Such superintending employe is regarded as standing in the place of the master as his agent in giving the order. It is another exception to the general rule that the common master is not responsible for the negligence of a common servant where another is injured in consequence. C., B. & Q. R. R. Co. v. May, 108 Ill. 288; Wabash R. R. Co. v. Harleck, opinion Supreme Court Ill., filed at Ottawa, June, 1887. This court is bound by those decisions.

The next objection is the modifying, by the court, the second offered instruction for appellant and giving it as modified. It is as follows: "If you believe from the evidence that the conductor of the train gave or caused to be given the usual and proper signal for the engineer to slow up or slacken the speed of the train, and *gave the deceased timely notice, to enable him to prepare for the natural effect of the slowing up according to such signal*, but that the engineer in attempting to obey such signal jerked the car on which deceased was standing more than usual, so that thereby the deceased was thrown from the car and killed, such jerking of the car would not, under the pleading in this case, be the carelessness, if carelessness it was, of the defendant, and the plaintiff would not be entitled to recover."

The words in italics constitute the modification made by the court.

Two questions arise: 1. Was the instruction as asked

proper. 2. As modified did it work harm to the appellants even if incorrect. We are of the opinion that the instruction was erroneous as asked for want of evidence to support it and otherwise, and also after it was modified for the same reason, and as modified worked no injury to appellants in any event. The object appellant had in view in offering this instruction was to raise an issue as to whether or not the cause of the accident was the negligence of the engineer in the manner of handling the train. If so, the negligence of the engineer would be that of a fellow-servant engaged in the same line of employment with deceased, and no recovery could be had.

The instruction as asked ignored the idea that any negligence on the part of the conductor concurring with any supposed negligence of the engineer would have any effect to prevent the negligence of the latter from standing for the cause of the accident. For the instruction says that if the jury "believe from the evidence that the conductor of the train gave or caused to be given the usual and proper signals for the engineer to slow up or to slacken the speed of the train, but that the engineer, etc., was at fault in handling the train, etc., there could be no recovery.

It is seen that this introduction to the instruction does not negative the idea that there was any negligence on the part of the conductor in the time and circumstances of ordering the signal in the particular complained of before deceased had time, after being ordered to leave one car, to reach the other and get securely seated. The usual and proper signals may have been given, but negligence in regard to time and circumstance remain. The instruction then amounted to the same as saying that it made no difference if the conductor was negligent in ordering the signal to slow up, yet if it was usual and proper as a signal, then, in case the engineer was negligent as to the manner of slowing up the train and the deceased was killed thereby, appellee could not recover.

This instruction was erroneous, as asked, for the reason that if the conductor gave the signal to slow up negligently and the engineer also was negligent, and the accident occurred in consequence of the two acts of negligence, the appellant would not be freed from liability.

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The court undertook to modify it in a manner to exclude the idea of negligence on the part of the conductor by adding, "and (the conductor) gave the deceased timely notice to enable him to prepare for the natural effect of slowing up according to such signal." It is true that there might have been other circumstances to excuse the conductor from any charge of negligence not stated in the modification, but we do not think the evidence discloses any. But even if there were other circumstances overlooked by the court that would have excused the conductor from negligence on the issue presented by the instruction besides that added by the court, and the appellant thereby cut off from its benefits and the instruction rendered useless in the form given, the appellant had no right to complain, as the instruction was bad as asked and not hurtful as given.

The main complaint made by counsel for appellant to the modification of the instruction is that it "ignores the idea that deceased was bound to use ordinary care for his own safety." This is not a just criticism. The object of the instruction was not to lay down the law as the duty of deceased to care for his own safety, but rather, as to whether the conductor was sufficiently free from negligence to allow the responsibility for the accident to be shifted onto the shoulders of the engineer. It was a side issue raised with the intent to shift the burden of responsibility from a responsible to an irresponsible party; from a conductor, for whose negligence appellant would be responsible, to an engineer, for whose acts it would not be. If the deceased were negligent it was of no consequence whether the one or the other or both of appellant's servants were negligent. In neither event could appellee recover.

The jury, in appellant's instruction No. 4, was fully instructed on this point. It is as follows: "If the deceased was familiar with the manner in which such train was usually handled at or near the gravel pit south of Buda where he was killed, and at the time of his death the train was being handled in the usual manner at the place, and that his death was caused by a want of ordinary care on his part in placing

himself in a dangerous position, so that he fell or was jerked off the car, on which he was standing, onto the track, and was run over and killed by the cars, etc., you will find for defendant."

The jury could not, in the face of the above instruction, have been misled on the point suggested, and in view of the fact that the modified instruction complained of did not purport to deal with this question. The court was fully justified also in refusing it on the grounds that there was no sufficient evidence on which to base it.

The evidence both on the part of the appellee and appellant concurs that there was no unusual jerk from the slacking of the train, caused by setting the air-brakes. There is positively no proof of any carelessness of the engineer. The brakes were set in the usual and ordinary manner and no unusual shock was experienced. The shock was only such as might naturally be expected and was only sufficient to knock a man off the train who was not sufficiently balanced or braced.

The evidence of H. A. Bullock, the engineer, introduced by appellant itself, entirely contradicts and disproves any carelessness on his part and shows that the jerk was an ordinary one. He swears: "When I saw the signal I applied the brakes a little, so as to slow up gradually." Again, "When I received the signal I applied the air-brakes as light as I could at first." "I applied the brakes that morning just as I always did." He testifies that the train was running from six to eight miles per hour that morning. "If it (the train) was slackened so the men fell down it might be quick and it might not." "It would take a considerable jerk to throw a man down." The conductor himself swears: "The jerk was no more severe than usual." There appeared to be no effort on the trial to show that the fault was on the engineer in causing an unusual jerk in stopping the train, and there is no proof to that effect, neither do the instructions for appellee allude to it. The evidence would not justify the jury in finding there was. It was therefore improper to raise such an issue, which could alone be mischievous in distracting the mind of the jury by directing it to such an issue.

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The court did not err in giving the instruction as modified or in refusing to give it as asked. The modification of appellant's sixth modified instruction as given was not error. It would have been proper to have refused it entirely, as there was no evidence on which to base it. The modification rendered it harmless. There was no question of the liability of fellow-servants in the case. All other modifications of appellant's proposed instructions were correct. The damages in our judgment are not excessive. The life of an industrious workingman, like deceased, ought to be worth the sum found by the jury in their verdict. The question of damages in cases like the one at bar is largely within the sound discretion of the jury trying the case. Perceiving no error in the record sufficient to reverse, the judgment is therefore affirmed.

Judgment affirmed.

GEORGE W. BRENT

V.

KENNER BRENT.

Set-Off—Mutual Judgments—Claim of Attorney for Fees and Disbursements—Fifth Exception, Sec. 60, Chap. 77, R. S.

The fifth exception, specified in Sec. 60, Chap. 77, R. S., allowing an attorney's claim for fees for services rendered and disbursements in procuring a judgment, priority over the set-off of a judgment in favor of the judgment debtor against his client, is general, and not limited in its application to fees and disbursements for which he has a lien at law or in equity.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Warren County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. GREER & DRYDEN and PORTER & MACDILL, for appellant.

"Attorneys have no lien upon judgments recovered in this

State for fees." Humphrey v. Browning, 46 Ill. 476; Forsythe v. Beveridge, 52 Ill. 268; LaFramboise v. Grow, 56 Ill. 197.

All that is intended to be secured by the fifth exception is "the fees and disbursements legally chargeable *and taxable* against the party *as costs*." Humphrey et al. v. Browning et al., 46 Ill. 476; Shapely v. Burrows, 4 N. H. 347; Wells v. Hatch, 43 N. H. 247; Forsythe v. Beveridge, 52 Ill. 268.

MESSRS. JAMES W. DAVIDSON and W. C. NORCROSS, for appellee.

LACEY, J. On the 21st of May, 1886, appellee recovered a judgment against appellant in the Circuit Court for the sum of \$125 and costs (\$205.90), and the appellee being indebted to Davidson and Norcross, his attorneys in the case, in a sum for legal services in the case to a greater amount than the judgment assigned in writing under his hand and seal, on the date of the judgment, the said judgment to his said attorneys to apply on their fees as far as the judgment would go, all of which assignment and facts connected therewith the appellant, at the time, had due notice, and Davidson and Norcross knew of the existence of the judgment in favor of appellant against appellee hereafter mentioned at the time of the assignment.

On the 24th day of July, 1886, the said Davidson and Norcross, the assignees of the judgment, caused an execution to be issued and placed it in the hands of J. W. Bolan, Sheriff of Warren County, for collection. The appellant, on the same day, had executions issued on four several judgments in his favor, out of the Circuit Court of said county, where they were rendered against the appellee, Kenner Brent, and placed in the hands of the same Sheriff for collection, to wit: One dated September 26, 1882, for \$35.85; one dated January 24, 1882, for \$26.80; one dated December, 1883, for \$58.10, and one dated January 24, 1886, for \$13.75. At the time the said last executions were issued and placed in the Sheriff's hands, the appellant demanded of the Sheriff that they should be set

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off against the execution in favor of appellee against appellant, and enough money was paid in to the Sheriff at the same time to pay the costs called for by the execution and fee bill in favor of appellee.

At the September term, 1886, of the Circuit Court of said county, Davidson and Norcross made a motion in said court for a rule on the Sheriff, John W. Bolan, to pay over \$125, amount collected by him on execution in favor of appellee against appellant, the judgment having been assigned to the said Davidson and Norcross.

The court took the matter under advisement and afterward, on the 5th day of March, 1887, held and decided the motion in favor of the said Davidson and Norcross, and ordered the said sum with the interest due thereon to be paid over to them, from which said order this appeal is taken.

It is claimed by the appellant that he has the right to set off his judgments against appellee's judgment against him, under and by virtue of sections 58 and 59 of Revised Statutes, Chap. 77, entitled "Judgments, Decrees, etc." The appellee insists, however, that the case falls within the *second* and *fifth* exceptions, specified in Sec. 60 of the above act. The sections and exceptions in question read as follows:

Sec. 58. "Executions between the same parties may be set off, one against another, if required by either party as prescribed in the following section."

Sec. 59. "When one of the executions is delivered to an officer to be executed, the debtor therein may deliver his execution therein to the same officer, whether the second execution is directed to the same or any other officer, and the officer shall apply it as far as it will extend to the satisfaction of the first execution and the balance on the larger execution may be collected and paid in the same manner as if there had been no set-off."

Sec. 60. "Such set-off shall not be allowed in the following cases: * * * *Second*. When the sum due on the first execution was lawfully and in good faith assigned to another person, before the creditor in the second execution became entitled to the sum due thereon." * * * *Fifth*.

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“Nor shall it be allowed as to so much of the first execution as is due to the attorney in that suit for his fees and disbursements therein.”

We will not stop to inquire whether the appellee's right to the money in question under the assignment can be sustained under the *second* exception or not, as it will not be necessary; but will proceed to consider his rights under the fifth exception.

It is insisted by counsel for the appellant that the fifth exception was intended to apply to attorney's fees only in case where such “fees and disbursements are legally chargeable and taxable against a party as costs,” as in cases of the assignment of dower and partition and in cases where an attorney had a lien on the judgment.

The case of *Forsythe v. Browning*, 52 Ill. 268, is cited as showing an attorney had no lien on the judgment which he recovers for his client. We think the statute was intended to apply and operate in favor of the attorney recovering the judgment in a broader sense than as contended for by counsel for appellant.

Of course as between the attorney and his client the attorney would have no lien, and the client might assume the control of the judgment and sell and dispose of it without his attorney's consent, but if the attorney once collect it he then may retain his fee and the client would have to allow it.

The Legislature was creating a new remedy in favor of creditors to enable them to collect their judgment by way of set-off, in a summary way. The Legislature no doubt considered the fact that an attorney's claim for fees and disbursements rendered in the very judgment that the judgment creditor would be allowed to appropriate was, as a rule, as meritorious, and in many cases more so, than the claim of the judgment creditor, who had no lien on the judgment which by the law being enacted he would be allowed, from a certain point not clearly defined by the statute. It was therefore thought just and proper, no doubt, to protect the attorney and not allow his fees to be intercepted in that way. In this case the judgment was procured through the skill and hard labor of Davidson and Norcross, which, without that or the equally hard

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services of some other attorney, would probably never have been recovered, and the appellee's right thereto never established, and the attorney's fee as admitted was reasonably worth the entire amount.

Would it be just and equitable to allow appellant to appropriate it to the payment of his judgment against appellee?

And it is insisted that by virtue of the statute the attorney could not secure himself by purchasing it from his client; that by virtue of the statute all appellant's existing judgments against appellee became a lien on it from the very moment it was rendered, they having been previously recovered.

If this be so, which we are not called on to decide, then the attorney's claim would be hopeless if his client was poor and he had to depend on the judgment he should procure for his fees and disbursements. This would have a tendency to prevent the poor from procuring legal assistance.

The language of the statute is that the sections in question should not apply "to so much of the first execution as is due to the attorney in that suit for his fees and disbursements therein."

What is meant by the words "fees and disbursements due therein?"

This evidently means fees and disbursements due for services rendered and money expended in the *suit* in behalf of the client. "Therein"! In the suit! That amount would be due him! Therefore that amount of the execution would be due to the attorney. This should not be set off. In referring to a part of the *execution* being *due* to the attorney it was not intended to mean that the attorney must have an actual lien on any portion of it, but it was used in the sense that that much of the execution as was equal to the amount due the attorney for his fees and disbursements in the suit in which the judgment was rendered, should not be set off.

To use strict and technical language, it would not be proper to say that any portion of the execution was due to the attorney, not even if he had a lien on it for his fees, nor if a portion of the judgment was for attorney's fees under some agreement or statute. The entire execution would still be due to

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the judgment creditor. If the Legislature had intended to confine the claim of the attorney to cases where he had some kind of a lien on the proceeds of the execution, it would have used very different language.

It would have used language like this: "Should not apply to so much of the execution upon which the attorney has a lien under the law or in equity for his fees and disbursements therein."

To thus restrict the application of the statute as claimed would be to reduce it as to attorney's claims for fees and disbursements to exceedingly narrow limits.

It seems to us it must have been the intention of the Legislature, in passing the above act, to give it general effect, and to make the attorney's claim for his fees and disbursements for services rendered and money expended in procuring a judgment a preferred claim as against a judgment creditor of his client who seeks to appropriate his client's judgment, under the provisions of the above statute.

So holding, the judgment of the court below is affirmed.

Judgment affirmed.

CHARLES W. CARROLL
V.
THOMAS B. HOLMES.

24	453
167s	396
167s	401

24	453
e115	1552

*Negotiable Instruments—Action on Note—Gambling Contracts—Sec. 131
Criminal Code—Mutual Intention—Evidence—Parties—Payment by Note.*

1. In an action upon a promissory note, it is *held*: That the defense that almost, if not quite, the entire consideration for which it was given, was losses incurred by the maker in dealings between the parties in options, is fully sustained by the evidence; that the evidence also shows the illegal intent to have been mutual; that it was unnecessary to show that the parties with whom the plaintiff dealt on the defendant's account, knew of the latter's intention not to take the grain and pork bought and sold; that the plaintiff could not recover upon any items of the original indebtedness without surrendering the note for cancellation either before suit or at the trial; that he can not maintain an action on the note and on some of such items at the

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same time; that the plaintiff was not entitled to open and close the argument on the evidence, the burden of proof being on the defendant; and that there was no substantial error in giving and refusing instructions.

2. A secret illegal intent in one party not known to the other will not invalidate a contract.

3. The acceptance of a promissory note is *prima facie* the satisfaction and payment of an open or book account, or antecedent debt, for which it is given.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Marshall County; the Hon. T. M. SHAW, Judge, presiding.

Mr. FRED S. POTTER, for appellant.

There is a total absence of proof as to who the Chicago parties were with whom the contracts were made, and as to their intention; without affirmative proof from the defendant as to who were such parties and their intention, the verdict in this case can not be maintained.

Having given his orders for corn, corn to be delivered to him, the plaintiff is bound by his orders. *Miller v. Bensley*, 20 Ill. App. 528; *Wolcott v. Heath*, 78 Ill. 433; *Prixley v. Boynton*, 79 Ill. 351; *Cole v. Milmine*, 88 Ill. 349.

If all of the other matters between the parties be expunged as founded on losses in unlawful ventures, yet it will not bar a recovery for money loaned long before the alleged unlawful dealings had in their inception; nor for money which the defendant actually paid to him and charged in account with the defendant's knowledge and consent. If it be found that the board of trade contracts were unlawful, then the defendant must repudiate all or none; he can not appropriate to himself the proceeds of such as were to his advantage and disavow all others. *Wolcott v. Heath*, 78 Ill. 433.

Messrs. BURNS & ONG, for appellee.

The intention of the law is to prohibit persons from dealing thus knowingly, as agents or otherwise; no room is left for avoiding the law by pretended agencies or by other means which the ingenuity of men may invent to escape liability and

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enforce the most pernicious contracts; neither can an assignee of an obligation tainted with such contracts, in whole or in part, enforce such contract. *Tenney v. Foote*, 4 Ill. App. 594, and numerous other cases cited; also *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Ill. App. 467, and numerous other cases cited.

All dealings in puts and calls are illegal and void, and can not be enforced if the taint remains as to any part of the promissory note given upon adjustment of such contracts; any fraudulent gambling contract entering into such note renders the whole instrument void, and the court will not inquire as to whether part of the transactions are legal and part illegal. 1 *Parsons on Contracts*, 380; *Henderson v. Palmer*, 71 Ill. 579; *Nash v. Monheimer*, 20 Ill. 215; *Munsell v. Temple*, 3 Gilm. 93; *Wheeler v. Russell*, 17 Mass. 257; *Chitty on Contracts*, 730; *Tenney v. Foote*, 95 Ill. 99; *Metcalf on Contracts*, 216.

The cunning devices of artful men to cover up frauds by rules and regulations of the board of trade and others dealing in puts and calls, are not allowed to avoid responsibility arising from such contracts, no matter what form may be adopted as to rules and regulations, or as to the form of contracts; the court will always inquire into the intention of the parties, look into all the surrounding circumstances and facts, and determine what the spirit of the contract really is. The acts, the conduct of the parties, have a controlling influence in determining what the intention is. *Tenney v. Foote*, 4 Ill. App. 594; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Pickering v. Cease*, 79 Ill. 328; *Lion v. Culbertson*, 83 Ill. 33; *Kreigh v. Sherman*, 105 Ill. 49; *Brand v. Henderson*, 107 Ill. 141.

BAKER, J. Carroll brought assumpsit against Holmes upon a promissory note for \$1,434.60, dated March 12, 1885, and due four months after date. The declaration contained two special counts on the note, and the common counts.

The pleas of appellee were that the note was made without any good or valuable consideration and several special pleas;

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and the pleas all averred that the note was the only cause of action. Issues were formed upon the pleas, and the results of a jury trial were a verdict and judgment for the defendant.

The principal contention between the parties seems to be, whether or not the consideration of the note is impeached by the evidence on the ground it was for losses on contracts negotiated by appellant for appellee for the purchase and sale of grain and other produce, the understanding and intention of the parties at the time being that no grain or produce should in fact be received or delivered, but that appellee should have the option to close the contracts when he saw fit, and make settlements upon the basis of the difference between the contract prices and the ruling market prices in Chicago.

Sec. 130 of the Criminal Code provides that whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and that all contracts made in violation of said section shall be considered gambling contracts, and shall be void. Sec. 131 of the Code provides that all promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing won by any gaming, or bet upon any unknown or contingent event whatever, or for reimbursing or paying any money or property knowingly lent or advanced at the time and place of such bet, to any person or persons so betting, shall be void and of no effect.

In the case of *Pearce v. Foote*, 113 Ill. 228, the Supreme Court say: "The true idea of an option is what are called, in the peculiar language of the dealers, 'puts' and 'calls.' A 'put' is defined to be the privilege of delivering or not delivering the thing sold, and a 'call' is defined to be the privilege of calling for or not calling for the thing bought. Optional contracts, in this sense, are usually settled by adjusting market values, as the party having the option may elect

It is simply a mode adopted for speculation in differences in market values of grain or other commodities. It must have been in this sense the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a gambling contract."

According to the evidence in this case Holmes delivered his orders for the purchase or sale, for future delivery, of grain or pork to Carroll, at Henry, and the latter transmitted them to Dow, a Chicago commission merchant, and guaranteed their performance by Holmes; and Dow found either a seller or purchaser as required, and charged a commission for so doing, which he afterward divided with Carroll. The contracts made were legitimate and valid upon their faces, and apparently contemplated nothing which was in contravention of the statute or opposed to the policy of the law. There was nothing, then, in the dealings between the appellant and appellee, or in the contracts, which was invalid, unless there was a mutuality of illegal intent, for it is a settled rule of law that a secret illegal intent in one party not known to the other will not invalidate.

There is no doubt of the illegal intent of appellee in these transactions, for he testified upon the trial that he did not intend to deliver any of the grain that he sold, or receive any that he bought, and there is nothing in the evidence tending to contradict him. It would seem, however, that he never in words communicated this intention to appellant, for he further stated that he never told Carroll that his intention was not to take the stuff he bought, nor that he did not intend to deliver the stuff he sold, and that in no case was there any expression of any intention to deliver or not deliver any of the commodities. Appellant testified that all of the transactions were actual and not fictitious; that they were not options but were for pork and grain to be delivered; that there was no understanding that the deals were to be anything but real and actual, and that Holmes would have received all of the pork and grain on his contracts if he had not closed them out before maturity. Notwithstanding these statements of the parties, the jury

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found that it was the intention of both of them, at the times the orders to sell or to buy were given, that no grain or pork should be either delivered or received, but that the contract should be closed out before maturity and settlements made on differences between contract and market prices.

This was necessarily the finding of the jury under the verdict they returned, for they were explicitly told by the court, in numerous instructions, that the legal intent of Holmes alone would not vitiate the contracts, but that the burden of proof was upon him to establish by preponderance of the evidence that Carroll knew at the times that the sales or purchases were made upon orders that the articles were not to be delivered or received; that the contracts for future delivery were not rendered unlawful or void by the fact that the parties may thereafter and before the maturity of the contracts have rescinded the same by agreement upon the understanding of the payment of differences in price; and that they had no right to find that the deals were not real unless the greater weight of the evidence proved they were not real.

The jury having found as matter of fact that appellant had knowledge the contracts in question were gambling contracts, the question arises whether or not the evidence sufficiently sustains such finding. No matter what the forms of the several transactions were upon their face, yet if the facts and circumstances in proof show that such forms were colorable only, and that it was the real understanding of both parties that there were to be no actual sales, no delivery or acceptance of the subject-matters of the contracts, but that damages were to be adjusted upon differences, then they were gambling transactions and within the purview of the statute, and this, whether the real intentions of the parties were formally expressed in words or not. It is altogether legitimate to look at the surrounding circumstances in order to ascertain and determine the mutual understanding and real intention of the contracting parties. From the facts and circumstances found in this record, from the course of dealing for a long series of months between appellant and appellee, and the character of the numerous transactions between them, we think the jury

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was fully justified in concluding that appellant knew the commodities contracted for were not to be delivered or received, and that the sales were colorable only and not real and *bona fide*.

A sagacious and well-informed man engaged in the business of grain speculations upon the board of trade would not be likely to act so blunderingly as to render himself liable to the fines, penalties, forfeitures and imprisonment imposed by the statute by openly expressing his intention to enter into a gambling contract. Nor is it probable that he would permit the person with whom he was dealing to express in his hearing such an intention; in fact, it would be expected of him that he would absolutely and at once refuse to deal with or receive orders from any one who was so indiscreet as to thus express himself. We know from the books and from numerous cases that have arisen in the courts, that many cunning devices are resorted to by artful men engaged in unlawful speculations in grain and other commodities, in order to cover up and conceal the real character of the transactions in which they are engaged, their purpose being to make illegal gains and at the same time avoid legal responsibility and the penalties denounced by the statute.

There are many salient facts found in this record tending to prove the guilty knowledge of appellant. In the seventy or more separate dealings had between the parties, extending through a period of about eighteen months, in no single instance did Holmes permit a contract to mature on his hands; but he uniformly ordered the contracts closed before the time for delivery or acceptance arrived. At no time was a contract consummated by the actual delivery to or receipt from Holmes of the article contracted. Besides this, Holmes was living on a farm and was a man of small pecuniary means, and yet, with actual notice Holmes was in embarrassed circumstances, appellant not only quite frequently, while holding but a small sum as security or "margins," but often when holding no security whatever, guaranteed the performance of the contracts made by him on behalf of Holmes. These deals aggregated some \$900,000, and ranged from 5,000 to 50,000

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bushels of grain and from 250 to 3,000 barrels of pork. It is unreasonable to suppose that appellant would, under such circumstances, make himself personally responsible as guarantor for the fulfillment of so many and such large contracts, involving such considerable sums of money, if he had supposed the contracts were real and *bona fide*, and would be required to be performed.

Upon the theory the contracts were optional and fictitious, and could be settled upon the payment of differences, and by himself as broker, in default of sufficient margins, the risks assumed were comparatively insignificant. Other facts and circumstances were in evidence tending to prove the real character of the transactions, and that appellant was fully advised that the dealings with appellee were colorable only, but we do not deem it necessary to comment upon them.

It is, however, urged by appellant that it is not enough for the purposes of the defense in this case that it was defendant's intention not to take or deliver the grain and pork bought and sold, and that such intention was communicated or known to appellant, and also to Dow, the Chicago broker, but that the evidence must go further and show with whom Dow made the contracts, and that they also knew defendant's intention, and consented to and did deal in "puts" or "calls."

The evidence shows that the dealings of Holmes were with Carroll and with him alone, and that they each relied solely upon the credit of the other; that the dealings between Carroll and Dow were between themselves alone and that they each relied solely upon the credit of the other; and that the contracts made by Dow in Chicago were solely between him and the parties with whom he contracted, and that he and such parties respectively, relied only upon the credit of each other; and that neither Holmes nor Carroll had any notice or knowledge with whom Dow made the contracts. The question here at issue is with reference to the agreements, dealing and understanding between appellant and appellee, and not in regard to the knowledge and understanding of these other and remote parties. If the understanding between appellant and appellee was that the deals as between themselves should

be settled upon differences, and that there should be no delivery of the commodities which were the subject-matter of the deals, then the contracts as between said parties were gambling contracts and within the statute.

The doctrine of agency has no application to the matter so far as the question of a violation of this penal statute is concerned; it was so expressly decided in *Pearce v. Foote*, 113 Ill. 228.

The case just cited is an authority in point to show that notice of illegality to Dow, and those with whom he dealt in Chicago, was not necessary to the defense in this litigation. Were the character of proof insisted upon by appellant, required, it would be difficult, if not impossible, to enforce the provisions of the statute.

It is a further contention of appellant, that as he had interposed a replication to the pleas which traversed the fact alleged therein, that the several causes of action in the declaration were one and the same, and also averred that he relied upon each and every cause of action in his declaration mentioned, he was, therefore, in any event, and even if the grain and pork contracts were unlawful and void, still entitled to verdict and judgment for \$159.60. He testified on the stand that he had paid to the defendant in actual cash \$159.60 more than he had received from him, even after deducting the proceeds of the oats that appellee delivered to him in his warehouse. Waiving the fact that appellee claims these cash items were all paid, we do not see any force in the point thus made.

It is admitted by appellant that the note for \$1,434.60 was executed in full settlement of the account he held against defendant, and that the cash items from which this \$159.60 is deduced, were all included in said account. The acceptance of a promissory note is *prima facie* the satisfaction and payment of an open or book account, or antecedent debt, for which it is given. *McConnell v. Stettinius*, 2 Gilm. 707; *Ralston v. Wood*, 15 Ill. 159; *Smalley v. Edry*, 19 Ill., 207; *Morrison v. Smith*, 81 Ill. 221; *Kappes v. The Geo. E. White Co.*, 1 Ill. App. 280; *Fridley v. Bowen*, 5 Ill. App. 190.

Appellant having taken a note in payment of the account,

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could not recover upon any items of the original indebtedness without surrendering the note for cancellation, either before suit brought or, at the latest, upon the trial and before the cause was submitted to the jury. *Stevens v. Bradley*, 22 Ill. 224; *Heartt v. Rhodes*, 66 Ill. 351.

It is suggested that the giving of a void note is not the payment of a lawful claim, and further, that the giving of a voidable note, when avoided, does not work a payment or bar against the recovery of a lawful demand which entered into and formed a part of the consideration of the voided note. This doctrine seems to be just and reasonable. It does not, however, have application to the present controversy. Appellant contended upon the trial, and is still contending in this court, that the note was and is valid and legal. Had he admitted the note was void and of no effect, he might consistently have taken the position stated and have sued for the recovery of the \$159.60. But he can not be permitted to blow both hot and cold with the same breath, and recover both upon the note and upon the original cause of indebtedness.

It is a sound rule of law, that a party can not occupy inconsistent positions and pursue inconsistent courses of action. *Herrington v. Hubbard*, 1 Scam. 569; *Derickson v. Krause*, 4 Ill. App. 507.

The statute provides, in express terms, that where the whole or any part of the consideration of a note is for money lost by any gaming, or by wager or bet upon any unknown or contingent event, then such note shall be void and of no effect. It is fully shown by the evidence and admitted by appellant that almost, if not quite, the entire consideration for which the note was given was losses incurred by appellee in his dealings in grain and pork contracts through the orders given by him to appellant. And, as we have already held, the evidence supports the finding of the jury, that these dealings between appellant and appellee were gambling contracts.

That which we have said above with reference to the matter of the \$159.60, sufficiently disposes of the assignment of error that the trial court erred in denying to the plaintiff the

opening and close of the argument to the jury on the evidence. The burden of proof was upon the defendant in the trial; and no injustice was done the plaintiff by the ruling of the court.

The instructions of the court, given at the instance of appellee, seem to have been substantially correct. We are inclined to think that one of them stated an abstract proposition of law that had no very apparent application to the case; and that several of them were not technically accurate; but we find no serious objections to any of them. The jury was instructed by the court very fully and liberally upon behalf of appellant. Some eighteen instructions asked by him were given without any modification.

Of the qualifications made in the three that were modified by the court, some were entirely proper and the others unimportant.

Of the seven which were absolutely refused, some were duplicate of instructions that were given, some did not accurately state the law, and some had no proper bearing upon the issues and were calculated to mislead the jury.

We find no error in the record of sufficient importance to reverse the judgment, and it is therefore affirmed.

Judgment affirmed.

24	463
66	126

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
V.
JAMES BRISBANE.

Railroads—Tickets—Failure to Procure—Extra Fare—Instructions—Duplicates—Remote Damages.

1. Railroad companies are required to keep their offices open for the sale of tickets to passengers for a reasonable time before the departure of each train and up to the published time for its departure, but not up to the time of actual departure.

2. If convenient and reasonable opportunity to purchase tickets is afforded the public, extra fare may be charged such as do not avail themselves thereof. A passenger refusing to pay the extra fare under such circumstances may be ejected from the train.

C., R. I. & P. R'y Co. v. Brisbane.

3. A demand for fare by the conductor of a passenger train must be obeyed or the passenger must, at the conductor's request, leave the train in a peaceable manner. If he refuses so to do, he can not recover damages for the use of necessary force in ejecting him from the train, unless the expulsion was malicious or wanton.

4. In the case presented, it is *held*: That certain instructions given for the plaintiff were improper; that the instruction touching the assessment of punitive damages was erroneous because not based on the evidence; that an instruction to the effect that the plaintiff might recover for the feelings of shame and humiliation which he endured in consequence of being put off and expelled from a public conveyance, was erroneous; that the court erred in refusing certain instructions; that the plaintiff was not entitled to recover the remote damages caused by his walk of several miles to another station, when he might have returned a short distance to the station from whence he started; and that it does not appear that the conduct of the conductor was wanton or malicious.

5. It is proper to refuse an instruction which is substantially identical with another which is given.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding.

MESSRS. THOMAS F. WITHROW, JAMES C. HUTCHINS and SNAPP & SNAPP, for appellant.

MESSRS. HIGGINS & AKIN, for appellee.

BAKER, J. It is six miles and a fraction from the station of New Lenox to Joliet, on the line of appellant's railway; and on the first day of June, 1886, the ticket fare from the one place to the other was 19 cents, and the train fare without a ticket was 29 cents. On the morning of the day indicated James Brisbane, appellee, arrived at the first named station at or about the time the train locally known as the 10:44 train stopped at the depot. He was desirous of procuring a ticket for Joliet, but the ticket office was closed, and he was unable to do so. Having business at Joliet, he got on the train without a ticket, and the train almost immediately thereafter pulled out from the station. In two or three minutes the conductor came along and demanded his

ticket, or in lieu thereof 29 cents fare to Joliet. Appellee had no ticket, but stated the circumstances and refused to pay more than 19 cents. Thereupon, the conductor, after some little altercation between them, stopped the train and put him off the cars at a place about a quarter of a mile from New Lenox depot. Brisbane's residence was about half a mile east of the depot. He did not go home for a horse and conveyance which he had there, but walked to Joliet, and being troubled somewhat with asthma, his bodily health was injured by such walk, and he felt the evil effects for two or three days.

In this suit against the railway company to recover damages for the tort in thus ejecting him from the train, Brisbane had a verdict and judgment for \$150. The facts with reference to the walk to Joliet and the consequent bodily injury were permitted by the court to go to the jury over the objections of appellant.

Numerous points are urged against the rulings of the court upon the trial; and a portion only of these it is deemed expedient to notice.

In the case of the St. L., A. & T. H. R. R. Co. v. South, 43 Ill. 176, the prior cases of C., B. & Q. R. R. Co. v. Parks, 18 Ill. 460, and St. L., A. & C. R. R. Co. v. Dalby, 19 Ill. 353, were qualified and explained, and it was there held that railroad companies are required to keep open their office for the sale of tickets to passengers for a reasonable time before the departure of each train and up to the time fixed by its published rules for its departure, but not up to the time of actual departure; and also held that if convenient and reasonable opportunity to purchase tickets is afforded the public, and parties do not avail themselves of it, then such parties are alone at fault, and must pay the extra fare demanded on the cars, or, on refusal, may be ejected from the train. The evidence in the case under examination tends strongly to prove that the 10:44 train was late in its arrival at New Lenox that morning and that the ticket office was open for the sale of tickets until after the expiration of the time fixed and advertised for the departure of the train. By the 3d, 5th and 6th instructions given

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at the request of appellee it was required of appellant that it should have kept its office open for the sale of tickets up to and until the departure of the train. They were, under the authority cited, very clearly erroneous.

There was also further error in the 6th instruction, for the reason that it allowed the jury to assess punitive damages in addition to actual damages, if they believed from the evidence that "the conductor in ejecting plaintiff from the train used unreasonable force or violence." There was no evidence upon which to base such instruction, or make the claim that unreasonable or unnecessary force and violence were used.

According to the testimony of the conductor and the brakeman, the only force used was that the former put his hand on Brisbane's shoulder, after he had declared he would not pay the fare demanded, and told him that he would have to pay his fare or get off the train, and that thereupon he got up and walked out of the car. According to the testimony of appellee himself, he refused to comply with the request of the conductor that he should leave the car, and the latter had to use force and violence in getting him up from the seat, and had to drag him out of the seat and shove him toward the door. There was nothing in this proving or tending to prove that more force was used than was necessary to eject him, or that the force or violence was unreasonable.

The 5th instruction, likewise, seems to be erroneous in respect to a matter other than that already mentioned with reference thereto. As it was no breach of duty to the public or wrong to appellee that the railroad company did not keep its office open for the sale of tickets up to the time of the actual departure of the train, it follows that the only actionable tort stated in said instruction was that appellee was ejected from the train at a place other than a regular station. Yet, the court told the jury that in assessing damages they might "also compensate the plaintiff for the feelings of shame or humiliation which he endured in consequence of being put off and expelled from a public conveyance.

The only point, under the instruction, in regard to which the rights of appellee were violated, was that he was put off

the cars a quarter of a mile from the depot instead of at the depot or regular station. In the case stated by the instruction appellant had a legal right to subject him to the indignity of an expulsion from the train, and the shame and humiliation consisted in being removed from the cars, and not in the place of removal.

The mortification of being put off the cars at a regular station in the presence of bystanders would undoubtedly have been as great as that caused by being ejected therefrom eighty rods from such station. Under the hypothesis submitted to the jury, appellee was entitled to recover only the damages occasioned by the fact that he was put off at the place he was, instead of at the depot. *C., B. & Q. R. R. Co. v. Parks*, 18 Ill. 460.

The court refused the motion of appellant to instruct the jury that the plaintiff should not be allowed to recover compensation or damages in consequence of walking to Joliet after being put off the cars. This action of the court was erroneous, as also were its rulings in admitting in evidence and afterward overruling the motion to exclude from the jury the testimony to which the instruction referred and upon which it was based. Appellee was only entitled to recover such damages as naturally flowed from and were the direct result of the wrong done him. His walk of over six miles to Joliet was not the natural consequence and natural result of the tortious act of putting him off the train a quarter of a mile from New Lenox depot. He might have walked back to the village, and there either have taken the next train or hired a conveyance to Joliet; or he might have walked three quarters of a mile to his own home, and there procured his horse and top wagon for the journey. His walk to Joliet was his own voluntary act, and not the proximate and necessary result of his ejection from the cars. He was in poor health and troubled with the asthma, but whether in such condition or not he had no legal right to injure his bodily health by a voluntary and unnecessary walk of six miles and over, and then call upon the appellant to compensate him in damages for such injury. Such element of damage is too remote and can not be recovered. *I., B. & W. R'y Co. v. Birney*, 71 Ill. 391.

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The 8th, 9th and 10th refused instructions were substantially alike in legal principle, and it was not the duty of the court to incumber the record with instructions which were, in effect, mere repetitions of each other. The court, however, should have given one or another of these instructions. The necessary protection of the lives, safety and comfort of the traveling public demands that the conductor of a passenger train should have the supervision and control of his train. It is the doctrine, as held in this State, that a demand on the part of a passenger conductor for fare must be obeyed, or else the passengers must, at the request of such conductor, leave the train in a peaceable manner. In either event, if he is wronged, he may seek and get redress in the courts. He can not, in case he makes resistance, recover damages for necessary force used by the conductor in ejecting him from the train, unless the expulsion was malicious or wanton. C., B. & Q. R. R. Co. v. Griffin, 68 Ill. 499; Pennsylvania R. R. Co. v. Connell, 112 Ill. 295.

The circumstances of the case in hand exclude any theory that the conduct of the conductor was wanton or malicious. The instructions were expressly limited to personal injury received while being removed from the car, and were based upon the hypothesis that the jury believed from the evidence that the conductor used only reasonable and necessary force in ejecting appellee.

For the errors indicated herein the judgment is reversed and the cause remanded. *Reversed and remanded.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

V.

MATILDA JOHNSON.

Railroads—Personal Injury—Evidence.

In an action against a railroad company to recover for injuries alleged to have been caused by the negligence of a conductor in assisting the plaintiff to alight from a train, it is *held*: That the evidence does not sustain the verdict for the plaintiff; and that evidence of the value of services of her daughters, who made no charge for such services, was improperly admitted.

C., B. & Q. R. R. Co. v. Johnson.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. O. F. PRICE and JACK & TICHENOR, for appellant.

Messrs. L. HARMON and McCULLOCH & McCULLOCH, for appellee.

The passenger is justified in obeying the instructions of the conductor in regard to entrance and exit to and from the cars and in changing from one train to another. C., B. & Q. R. R. Co. v. Sykes, 96 Ill. 111, 162; Allender v. C., R. I. & P. R. R. Co., 43 Iowa, 276; St. L., I. M. & S. R. R. Co. v. Cantrell, 37 Ark. 519; McIntyre v. N. Y. Cent., 37 N. Y. 287.

Carriers of passengers must afford all needful accommodations to enable them to alight from the conveyance. K. & N. L. P. Co. v. True, 88 Ill. 608; Eagle Packet Co. v. Defries, 94 Ill. 598; I. C. R. R. Co. v. Slatton, 54 Ill. 133; Imhoff v. C. R. R. Co., 20 Wis. 344; Memphis R. R. Co. v. Whitfield, 44 Miss. 466.

Assistance rendered by conductors is within the line of their duty, and negligence therein renders principals liable. Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49.

Crippled and infirm persons are entitled to more consideration on account of their infirmities. Colt v. Sixth Ave. R. R. Co., 1 Jones & Spencer, 190; Del. & Lac. R. R. Co. v. Naphleys, 90 Pa. St. 135; Sheridan v. R. R. Co., 36 N. Y. 39; O'Mara v. R. R. Co., 38 N. Y. 445.

LACEY, J. This is a suit brought by the appellee to recover damages for injury to her right leg and knee, interfering with her power of locomotion, resulting from a fall in 1885 while changing cars at Galesburg from one branch of appellant's road to another, the fall being occasioned as is alleged by the carelessness of the conductor on appellant's train who was assisting her to alight from the platform or steps of the car to the landing below.

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The appellee claims that the conductor held out his arms as if to assist her and when she attempted to take hold of him or rely on his assistance he suddenly removed them and let her fall, by which she was greatly injured. The conductor, however, says the appellee was falling before he attempted to assist her. The damages claimed are \$5,000 and the jury gave her the full amount.

It is argued by counsel for appellant that the proof failed to support the allegation of negligence, or the amount of damages recovered.

It seems that the right leg was somewhat shorter than the other and larger at the knee joint and ankle and that appellee was disabled in her power to walk without crutches. But the decided preponderance of the evidence shows that the condition of the limb was caused by a fracture of the neck of the thigh bone which had been broken off where the socket goes into the hip bone several years before the accident in Galesburg.

Dr. Thomas attended her for this injury and states that it left a lameness so she had to walk with a cane, and that there was shortening of the limb in consequence.

Dr. Stewart testifies, that there is cracking or grating to be felt in the knee joint and something of that kind in the ankle but not so much. That this indicates dryness of the parts and that there has been excessive inflammation in the parts, etc. He attributed this condition to some old injury resulting in a low grade of inflammation and it has continued a long time.

Drs. Santhord and Dickenson, who attended appellee at the time of the alleged injury, both state that she told them that at the time they called on her professionally the enlarged condition of the leg was caused by the injury to the thigh bone. Appellee and her two daughters deny that she made the statements, but as far as we discover from the record they do not testify that such was not the case.

These two attending physicians testify that the injury they were called on to treat consisted, to outward appearances, of a small red spot just below the knee about the size of a quarter of a dollar and that in their opinion the injury was a simple

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sprain of the muscles or tendons about the knee which was not permanent in its nature. It may be admitted that there was slight evidence to the contrary but to our minds it seems clear that there was no sufficient injury shown resulting from the accident complained of as would justify a large verdict for damages saying nothing of the amount found by the jury, \$5,000.

It would seem that the jury must have given her compensation for the damages resulting from the injury to the thigh bone as well as those resulting from the fall at Galesburg. The evidence was also meagre to show that the injury at Galesburg was more the negligence of the conductor than of appellee. We will not undertake to canvass that evidence in detail as the cause must be retried and such course would serve no useful purpose. The other errors assigned it will not be necessary to notice, as, if any exist, they will no doubt be corrected on a new trial, with the exception, we may state, it was error to admit in evidence the value of the services of appellee's own daughters, who made no charge for their services.

The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

WILLIAM H. REYNOLDS

V.

TIMOTHY MOSHIER, FOR USE OF, ETC.

Negotiable Instruments—Delivery of Note—Chattel Mortgage Sale.

1. A delivery to the payee, actual or constructive, is essential to the validity of a promissory note.

2. A person receiving a promissory note not payable to himself, without indorsement, takes it subject to all legal and equitable defenses.

3. In an action on a note alleged to have been taken for personal property sold at a chattel mortgage sale by an agent, it is *held*: That the evidence almost conclusively shows a want of delivery; and that the court below erred in giving and refusing instructions.

Reynolds v. Moshier.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Kane County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. J. A. McKENZIE, for appellant.

No brief filed for appellee.

LACEY, J. This was a suit commenced before a Justice of the Peace, and judgment rendered against appellee, whereupon it was appealed to the Circuit Court, and was there tried by a jury and verdict and judgment in favor of appellee for \$18.05.

The basis of the suit was a purported promissory note for the sum of \$9, dated October 28, 1876, due seven months after date, payable to Timothy Moshier and signed by W. H. Reynolds and J. A. Reynolds. The appellant by affidavit put in issue the fact of the assignment to or the ownership of the said Elizabeth Reynolds, in the said note.

The evidence on the part of appellant tended to show that the note was taken by him to Timothy Moshier for personal property sold by him as the agent of said Timothy Moshier, at a chattel mortgage sale of property, on a chattel mortgage given by S. M. Reynolds to said T. Moshier, in January, 1875, and that said T. Moshier gave the note to appellant for his services, and that said T. Moshier had never assigned or in any manner delivered the said note to Elizabeth Reynolds or any one for her, and the said Timothy Moshier disclaimed any interest in the note or of having any claim against appellant, and that the note was not given for any property of Marion Reynolds not in the chattel mortgage.

The evidence of the appellee tended to show that S. M. Reynolds, the husband of Elizabeth Reynolds and the maker of the chattel mortgage, had some other property not in the chattel mortgage and at the sale had it sold by his brother, the appellant, with the mortgaged property, but he never talked with Timothy Moshier about it. That some of his

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property was sold at \$9, to appellant, and James signed it as security. It was in the note book with the other notes, and that on the night of the day of sale appellant handed the note to him and that ever since that time the note has been in the possession of the said S. M. Reynolds.

Upon this state of the evidence the court below instructed the jury on the part of appellee as follows:

"The court instructs the jury for the plaintiff that if they believe, from the evidence, that the defendant William H. Reynolds bought at public sale of his brother's effects property to the amount of the note and gave his note on the day of sale, with his brother James Reynolds as security, and that the note was made payable to Mr. Moshier as accommodation to the owner, Marion Reynolds, that the owner took possession of the note on the day it was given and has had it ever since, and that the note was never paid to either Moshier or Reynolds, then it will be the duty of the jury to find for the plaintiff the amount due on the note." The appellant then asked the court to instruct the jury by his third refused instruction, that, "in order to give validity to a promissory note, there must be not only an execution thereof, but there must be a delivery to payee or some one for the payee, and in this case, if the plaintiff, in behalf of Elizabeth Reynolds, claims that the note was never given for the property to which Moshier had any claim, that Moshier never had anything to do with the note and knew nothing about it, that it was given for property of Marion Reynolds and the note was never delivered to Moshier or any one for him, but was delivered to Marion Reynolds, then if such claim is sustained by a preponderance of the evidence, the plaintiff Moshier never was the legal holder of the said note, and this suit can not be maintained." But the court refused to give the said instruction to which ruling the appellant, at the time, excepted.

Thereupon the jury found a verdict for the appellee for \$18.05, and after refusing to set aside the verdict and grant a new trial, the court rendered judgment on the verdict, from which judgment this appeal is taken, and the giving of the appellee's instruction above recited and the refusing the appel-

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lant's instruction No. 3, is assigned, among other things, for error.

The evidence in the case almost conclusively showed that the note in question was made payable to Moshier, if it was given for property not in the mortgage, without any authority from him, either express or implied. It was done without his authority or consent, and was not within the general scope of the authority given to appellant to sell the mortgage property and to take notes thereon. It seems the giving of the note in question, according to Marion's evidence, was a device entered into between him and appellant to secure his property from his creditors, without Moshier's knowledge or acquiescence. Evidently under such circumstances the pretended note would be void. The note, as a note, was worth no more than blank paper. It requires the consent of the payee of a note, as well as the maker, to make it valid. Not only must it be signed, but it must be delivered, to make it a note.

This note, invalid as it was, if given for property not covered by the mortgage could not be vitalized by delivery by appellant to Marion Reynolds, and by him to his wife, Elizabeth. Defense can be made to it in either of their hands, as there was no indorsement of the note by Moshier. This principle has been fully decided in the *First National Bank v. Strang*, 72 Ill. 559.

It follows, then, that the court erred in giving the above instruction on the part of the appellee, and in refusing the appellant's third refused instruction. Again, if the evidence showed that it was the property of Moshier included in the chattel mortgage, then Moshier had a right to dispose of it to appellant in any way he saw proper, accounting for it to Marion Reynolds.

For the reasons above given the judgment is reversed and the cause remanded.

Reversed and remanded.

Murphy v. Curran.

MICHAEL MURPHY ET AL.

v.

JOHANNA CURRAN ET AL.

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Dram Shops—Action for Damages for Causing Death—Instructions—Repugnance—Exemplary Damages—Evidence.

1. Instructions which state the law differently in regard to a particular matter or state of circumstances, are repugnant, and no repetition of the correct instruction can cure the error in the other.

2. In an action brought by a widow and her minor children against saloonkeepers, to recover damages for causing the death of her husband and their father, it is *held*: That an instruction which does not require the jury to find that the death was caused by the alleged intoxication, is erroneous; that this error is not cured by other instructions which fairly submit that issue to the jury; that an instruction as to exemplary damages, in view of the evidence, was improperly given; that, to warrant such an instruction, there must be something beyond the mere fact of the sale of intoxicating liquors and resulting damages; and that there was not sufficient evidence against one of the defendants to justify the verdict against him.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. MALONEY & STEAD and S. C. STOUGH, for appellant.

Messrs. BULL, STRAWN & RUGER, for appellee.

LACEY, J. This suit was brought by appellees, the widow and minor children of Michael Curran, deceased, under the Dram Shop Act, against John Down, C. O'Laughlin, Ernest Waterman, Martin McGitrick, Henry Rook, Charles Rook, Charles McGitrick, Michael McGitrick, Walter Adams, Michael Murphy and John Heaton, saloonkeepers in the village of Seneca, to recover damages to their means of support caused by the death of said Curran, December 6, 1885, which death is alleged to have been caused by the intoxication of Curran

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produced in whole or in part by the above named defendants selling or giving away to him intoxicating liquors.

On the trial of the cause before a jury, after the evidence was all in, there being no evidence against the eight of said defendants first above named, the suit was dismissed as to them on the plaintiff's motion, leaving the suit to stand against the three last named, Walter Adams, Michael Murphy and John Heaton.

The jury found the three last named defendants guilty and assessed appellees' damages at \$5,000, upon which verdict the court, after overruling a motion for a new trial, rendered judgment, from which judgment this appeal is taken.

The circumstances of Curran's death were about as follows:

On the afternoon of December 5, 1885, he was in the village of Seneca, and was seen in several saloons that afternoon drinking, and playing cards and pool in some one or more of them. The last seen of him was about half past six or seven o'clock P. M., a little after dark, in front of Michael Murphy's saloon, not drunk or sober—but "had a few drinks in" as one witness testifies—was "under the influence of liquor" as another states, and still another that he "was drunk;" all the witnesses thought at the time he was able to take care of himself; one witness for appellant saw him at seven and thought him sober.

For the last few years he had been in the habit of getting intoxicated. Some time between six and seven o'clock P. M., of the 5th, in the condition above stated, he started to ride home on a gentle horse.

The next seen of him was by John Stanton, who had been with him at Michael Murphy's saloon in Seneca, as above stated, lying in the highway apparently paralyzed, with his horse four or five feet from him. He was taken by Mr. Stanton and another and conveyed home in a buggy, and his wife sent for the doctor, who, on arriving there, found him unconscious and his breath smelling of liquor. The injury seemed to be in the head caused by falling or something of the kind. The opinion of the doctor was that there had been a slight fracture of the base of the skull. He died the next

morning at seven o'clock. It was about eight o'clock in the evening when he was taken home. It will be seen that there was no positive or clear proof that the injuries causing his death were the result of any intoxication, though the circumstances tended to show that such was the case. It was a proper question to be submitted to the jury on proper instructions.

It appears, from the evidence, that some time in the year 1882, the village Constable, Patrick Meagher, notified the defendant Heaton not to sell the deceased, Curran, any more liquor, as he was in the habit of getting intoxicated, but no notice was given to the defendants Murphy and Adams, they not being in the saloon business at the time.

The causes assigned for error are the giving of improper instructions on the part of the appellees, and that the evidence is not sufficient to support the verdict, and also the refusing proper instructions on the part of appellants, notably, the third and eighth refused instructions.

The first objection made by counsel for appellants is to the second given instruction for the appellees. It is as follows:

"If the evidence shows that Michael Curran was intoxicated on the said 5th day of December, 1885, and that such intoxication was caused in part by intoxicating liquor sold or given to him by said defendant Adams, or some one in his employ, and in part by intoxicating liquor sold or given to him by said defendant Heaton, or some one in his employ, and in part by intoxicating liquor sold or given to him by said defendant Murphy, or some one in his employ, then all of said defendants are jointly liable for all the injuries sustained by said plaintiffs in their means of support (if any is shown by the evidence), notwithstanding some one of the defendants may have contributed thereto to a greater extent than the others. And it would make no difference whether Curran called for the liquor himself or some one treated him or called for it for him."

We think the instruction is erroneous in the particular complained of, in that it does not require, to create liability, that there should be any evidence that Curran came to his death in consequence of the alleged intoxication. The instruction ignores that question and does not require the jury to find that

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the death was caused thereby, but expressly tells it that in case the appellants sold deceased the intoxicating liquor in certain manner specified, then all of the appellants were jointly liable for the injuries, if any were sustained by appellees in their means of support.

If the cause of the death had, from the evidence, been so apparent that the jury must necessarily have found that it was the result of the intoxication, supposed by the instruction to be proven, then, perhaps, no injury could result from the error, but the evidence was not so clear on that point and should have been fairly submitted to the jury. It is true that other instructions given for appellees, as well as for appellants, fairly submit such issue to the jury, and it is claimed that this cured the error in instruction No. 2. But we are inclined to think not, under the facts in this case.

In *Hoge v. The People*, 117 Ill. 35, a case similar to this on the question we are now discussing, the Supreme Court, in answer to the same suggestion that is made here, that as other instructions stated the law accurately, the erroneous instruction could do no harm, says: "But where an instruction says the law is one thing with regard to a particular matter or state of circumstances, and another instruction says the law is another and materially different thing in regard to the same matter, the instructions are repugnant and no repetition of the correct instruction can cure the error of those that are incorrect, for the jury, assuming, as is their duty, that they are all correct, may as readily follow those that are incorrect as those that are correct." This quotation expresses all that need be said in reference to the suggestion made.

We are also inclined to think that, the state of the evidence considered, it was error to give appellee's eighth instruction relative to exemplary damages. The jury was instructed that it might find exemplary damages in addition to actual damages if it "believed from the evidence that the liquor was sold wantonly and wilfully, or under aggravating circumstances, to such an extent as they think proper, from all the evidence, should be awarded against the defendant found guilty who is least liable."

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This instruction appears to recognize the rule of law that to authorize the recovery of exemplary damages there must be some kind of turpitude on the part of the wrongdoer outside of the fact that there was a bare right of recovery.

Facts and circumstances varying with the features of the case may authorize it, but there must be something beyond the mere fact of the sale of intoxicating liquor and resulting damages to justify it. *Kellerman v. Arnold*, 71 Ill. 632; *Meidel v. Anthis*, 71 Ill. 241, 247; *Hacket v. Smelsley*, 77 Ill. 109. And the instruction also recognizes the principle that the finding of exemplary damages should be no more than would be assessed against the defendant least at fault. That is, that there should not be a verdict for exemplary damages for all in a joint suit where one of the defendants was not subject to such assessment.

We find no fault with the principle announced in the instruction except that portion which told the jury that exemplary damages could be assessed where the intoxicating liquor was sold wilfully. We think this might be misleading. To sell liquor at all is to sell it knowingly and wilfully. The wilfulness must refer to the sale under some kind of circumstance showing a wilful disregard of the law on the subject, or of the consequences to those depending on the deceased for support.

But the serious objection to the giving the instruction is that the circumstances of the case as to the defendant Adams did not warrant it at all. As to the other two it might. Heaton, if there was any proof against him at all, had been notified not to sell Curran any intoxicating liquor. The evidence tended to show that Murphy had sold deceased liquor while he was intoxicated.

But almost the only proof against Adams was the testimony of John Sullivan. When Sullivan went into Adams' saloon on Curran's invitation it was early in the afternoon, between 12 o'clock m. and 2 o'clock p. m., and at that time Curran, as Sullivan swears, was not under the influence of intoxicating liquor. It is true that there was evidence that Curran was in Adams' saloon again late in the afternoon when he may have been somewhat intoxicated, but there was no proof that he

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drank anything at that time, unless the mere fact that he was in the saloon for a short time could be deemed proof, which we think it could not, at least sufficient.

It is insisted that the fact that Curran had been in the habit of being intoxicated for a few years prior to that time, and that Adams lived in Seneca and kept saloon for a part of the time, was sufficient to charge Adams with notice of the fact; but we think other proof was required than that found in the record to charge Adams with such notice. We conclude, then, that there was not sufficient proof against Adams to warrant such an instruction.

We are also of the opinion that there was not sufficient evidence against defendant Heaton to warrant the jury in finding him guilty.

The only evidence against him in regard to his having sold Curran any intoxicating liquors consisted nearly entirely of the testimony of John Stanton and some others, that they had seen him in Heaton's saloon during the afternoon, and that Curran became intoxicated, and that he was a man that liked to drink.

Stanton's testimony was about as follows: "Saw him (deceased) first in Heaton's saloon, about 4 o'clock; there was a big crowd in. I was in a hurry; it was pretty cold and I stood by the stove warming myself. Curran came up and told the bartender to get me the best there was in the house. I took some whisky and he paid for it; threw 10 cents on the bar and paid for it. I took the whisky at the bar. He had a cue in his hand—billiard cue. The pool table was right back of the stove; east of the stove. I was about fifteen feet from the bar. I stayed there ten or fifteen minutes. I only drank that once with him. Stanton then went out and came back in about half an hour and saw Curran still there; he was standing back of the pool table talking. This is all I know about it. I saw him after that in Michael Murphy's saloon. I did not see Michael Curran drink any liquors in Heaton's saloon that day."

Thomas Cudigan saw Curran in Heaton's saloon playing pool at 2 or 3 o'clock that day; saw him go up to the bar with

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James Stanton, but did not see him “drink any liquor at John Heaton’s that day.” About 4 o’clock Discol saw deceased in Heaton’s saloon standing at the bar alone—nothing on the bar before him. Saw him drink nothing at Heaton’s. Patrick Meagher and one or two others might have seen deceased in Heaton’s saloon about this time.

It will be remembered that Heaton had been notified not to sell Curran any intoxicating drinks in 1882, and this may account for his treating John Stanton without drinking himself. The fact that Curran was intoxicated during the day, in view of the fact that he had been spending a good deal of his time in Murphy’s saloon and that there were other saloons in town can not be of any weight. It will not do to infer that merely because a man enters a saloon that he purchased intoxicating liquors of the saloonkeeper.

It ought to require more substantial proof; yet on such testimony a judgment was recovered against Heaton of \$5,000.

For the above errors the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

SELINA GILMORE AND DAVID GILMORE, IMPL’D, ETC.,
V.
MARTIN C. BISSELL.

Usury—Interest on Interest.

Upon the renewal of a note the parties may contract to give and receive interest on yearly interest already due without rendering the transaction usurious.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Will County; the Hon. DORRENCE DIBELL, Judge, presiding.

Mr. E. MEERS, for appellants.

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To give a greater rate of interest than is allowed by statute, on a pre-existing debt for an extension, is within the statute. *Shirley v. Welty*, 19 Ill. 623.

Interest past due and unpaid can not be added to the principal and draw interest. *McFadden v. Fortier*, 20 Ill. 509.

The fact that new notes, from time to time, have been given does not change the case. *Saylor v. Daniels*, 37 Ill. 331; *House v. Davis*, 60 Ill. 367; *Jenkins v. International Bank*, 97 Ill. 568.

If a usurious contract is made, express or implied, to take or reserve more than lawful interest, it falls within the statute. *Peddicord v. Connard*, 85 Ill. 102.

When it is provided the interest is payable annually—which is not paid when due—it may by agreement, after due and unpaid, be added to the principal and draw interest. *Thayer v. Wilmington Star Coal Co.*, 105 Ill. 540.

To constitute usury from taking interest upon interest, it is not necessary to prove that there was an agreement made in advance for the payment of such interest. To give a sum in excess of the legal interest for an extension, the contract will be usurious. *Leonard v. Patton*, 106 Ill. 99.

It is usury to take interest on interest, which exceeds the amount of interest fixed by the statute as the maximum. *First National Bank v. Davis*, 108 Ill. 633; *Farwell v. Meyer*, 35 Ill. 40.

Interest is payable on interest only on express contract made after the interest has become due and payable. *Leonard v. Villars*, 23 Ill. 377; *Barker v. International Bank*, 80 Ill. 96, 101; *Edgerton v. Weaver*, 105 Ill. 43.

Mr. GEORGE S. HOUSE, for appellee.

In the case at bar the appellants agreed to pay interest annually. This they did not do. A settlement was had in August, 1878, and the loan renewed and extended. In the making of this renewal and extension, and as consideration therefor, they agreed to pay interest at six per cent. on annual interest then due and unpaid from the time of its maturity. *Haworth v. Huling*, 87 Ill. 23.

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LACEY, J. The appellee filed his bill against appellants to foreclose a certain mortgage given by them to Wm. Findley on certain real estate situate in Will County, dated December 1, 1883, to secure the payment of a certain promissory note also given to said Findley, dated October 25, 1883, and due October 24, 1884, for the sum of \$2,969.15, with interest at the rate of eight per cent. per annum. The bill alleged that the said Findley duly assigned the said note and mortgage to appellee, and that the entire sum was due.

The appellants answering, admit the execution of the said note and mortgage, but set up and insist on certain deductions on account of usury, as follows: On April 14, 1875, appellees gave to said Findley their note and mortgage for \$1,000 with interest at ten per cent., and renewed the same August 28, 1878, no interest having been paid, which was due annually, by giving a renewed note and mortgage for the sum of \$1,350, being about twelve and a half per cent. interest instead of ten as the mortgage provided, the interest being arrived at by counting interest on the interest due at six per cent. Without counting interest on interest due there would have been only \$1,337.50. The note of 1878 drew ten per cent. interest payable annually. That afterward the note and mortgage in suit was given containing a new consideration of \$1,006.35 besides the last renewed note and interest on which the interest was computed the same as the first renewal. The mortgage was duly foreclosed without deduction for usury.

It is claimed that the usury taken in 1878 in the renewal consisted in charging \$12.50 too much; and that this originated in charging interest on interest due at the rate of six per cent., and in the same manner on the second renewal.

It will be seen by reference to the evidence that this was done by express agreement between Findley and appellants, at each time of renewal. It can not matter that appellants did it to save suit and foreclosure; they were nevertheless free agents. We are of the opinion that the transaction was legal, and that the appellants could contract to give and Findley to receive interest on the yearly interest after due. In this case that was all that was done. In *Haworth v. Huling*,

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87 Ill. 23, a case very similar to this, the Supreme Court say: "The mortgagor could pay interest on interest previously due on his indebtedness under his contract if he chose." That was all that was done in this case, and the transaction appears to have been legal and not obnoxious to the statute of usury.

The decree of foreclosure is affirmed.

Decree affirmed.

FRED WILLITS
v.
CHARLES G. SLOCUMB.

Injunctions—Dissolution in Part—Breach of Bond—Taxes—Pleading.

1. Where an injunction enjoining the collection of separate and distinct taxes due to separate and independent corporations is dissolved as to part and sustained as to the remainder of such taxes, there is a breach of the bond.

2. In the case presented, it is *held*: That the breach as to attorney's fees was not well assigned; and that the demurrer to the declaration should have been overruled, the general breach assigned being sufficient to sustain a recovery of at least nominal damages.

[Opinion filed December 9, 1887.]

IN ERROR to the Circuit Court of Mercer County; the Hon. JOHN C. BAGBY, Judge, presiding.

Messrs. BASSETT & WHARTON, for plaintiff in error.

Messrs. PEPPER & BROCK, for defendant in error.

LACEY, J. This was a suit on an injunction bond executed by defendant in error, as surety for the Burlington Lumber Company in the sum of \$500 in a bill of equity of the said Burlington Lumber Company, against plaintiff in error, filed in the Circuit Court March 3, 1886, praying the plaintiff in

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error might be enjoined from doing certain things and acts in the bill mentioned, which said bond had a condition therein specified as follows: That if the said Burlington Lumber Company should well and truly pay to plaintiff in error all such costs and damages as should be awarded against it, in case the said injunction should be dissolved, then the said written obligation to be void, otherwise to remain in full force.

The declaration shows that upon the giving of the said bond a writ of injunction issued out of the said court, etc., enjoining the plaintiff in error, collector of taxes for the town of New Boston in said county to desist and refrain from collecting certain taxes levied and assessed against said Burlington Lumber Company for the year 1885, amounting to \$204.96 until the further order of the court in the premises, and that the writ was duly served. The declaration further avers that at the November term of the Circuit Court, 1886, such proceedings were had, to wit, on December 9, 1886, that it was adjudged and decreed by the said court that the said injunction should be dissolved as to all of the taxes so restrained except the city and bond taxes of the corporation of New Boston. The declaration further avers that the plaintiff in error was the collector of taxes in the town of New Boston for the year 1885, and at the time the said injunction was issued and served on him, he had the collector's books with warrants commanding him to collect certain taxes therein levied and assessed against the said Burlington Lumber Company for the year 1885, amounting to the sum of \$204.96, all of which amount, to the sum of \$115.92, was for State, town, road, bridge and school tax; that said injunction was dissolved as to all the taxes last aforesaid, and that the plaintiff expended and became liable to pay for attorney's fees and other expenses in defending the said injunction suit the sum of \$100, which had not been paid, claiming the right to recover on the bond and damages to the sum of \$500.

In this declaration a demurrer was sustained by the court, and plaintiff in error abiding his declaration, judgment was rendered against him for costs, and to reverse such judgment this writ of error is sued out.

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The question arising on this record is whether there was any breach of the obligations of the bond; in other words, was the injunction dissolved in contemplation of law. And coming to particulars, the question arises whether the obligation to pay the penalty in the injunction bond is complete where the breach of the condition is to only a number of the taxes enjoined. The condition in the bond declared on, was that the obligation should be void if the injunction was sustained, and should be in force in case the injunction should be dissolved.

Now the injunction was only dissolved as to a number of the taxes, and sustained as to one. It was dissolved as to \$115.92, and sustained as to the balance, \$99.04, the latter being the city and bond taxes of the city of New Boston.

We are inclined to hold under the peculiar state of facts in this case, that there is a breach of the bond. It is seen the injunction is dissolved in whole so far as it went to a number of the taxes named in the writ. The taxes are due to as many distinct municipalities as there are kinds of taxes. No one of them has any concern with the other. The one is not authorized to defend or litigate for the other. The tax collector is the agent of all to collect merely. If the injunction had been sustained as to a part of each and dissolved as to a part, the matter would be different. There would be no breach, clearly, in that case. High on Injunctions is cited, second edition, paragraph 1678. It reads: "When an injunction is perpetuated in part, the plaintiff should not be required to pay costs, since he is the prevailing party as far as the injunction is allowed to stand, and it is error to decree costs against him." But this refers to cases unlike the one at bar, where the matters enjoined are separate and independent, and the amount due to separate and independent corporations, and are separate and distinct claims that are enjoined.

The bond fairly read would be so interpreted. The injunction itself is a several one in its nature. But the breach as to the attorney's fees, the special damages, is not well as signed. It is in these words: "And the plaintiff expended, and became liable to pay for attorney's fees and other expenses in defending said injunction suit, the sum of \$100."

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This *defending* refers to the entire suit and no particular part of it. If the plaintiff in error had paid out this entire sum for the city of New Boston for defending for it and paid nothing on the account of the taxes for which the injunction was dissolved, then he spent that sum in defending the *suit*. This might very easily be the condition of affairs and the defendant in error called on to defend a suit wherein the declaration does not show by necessary averments any liability.

Pleading is always taken most strongly against the pleader. If we do so in this case the declaration fails to show any breach as far as the special assignment of breaches is concerned. But the demurrer is a general one, and if there is enough in the declaration to sustain the cause of action without the special assignment of damages then the demurrer should have been overruled. We think there was. The averment showing that the injunction had been dissolved as to the taxes named, was, as we have shown, sufficient to show a breach of the bond.

It follows, therefore, without further assignment of breaches or damages the appellee was entitled to recover at least nominal damages. The general breach was sufficient for that purpose. The demurrer should have been overruled as a whole. It follows for the error of the court in not overruling the demurrer to the declaration the judgment is reversed and the cause remanded.

Reversed and remanded.

SILAS LEES

V.

DRAINAGE COMMISSIONERS.

Drainage—Legal Existence of District—Change of Boundaries—Statutes—Estoppel—Jurisdiction of Commissioners—Affidavits—Certiorari—Discretion.

1. Under the Acts of 1879 and 1881, the boundaries of a drainage district might be changed by the commissioners without a change of the peti-

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tion and without affidavits showing the existence of the jurisdictional facts required.

2. Upon a writ of *certiorari* to test the legality of the organization of a drainage district, it is *held*: That said district may have been properly organized and its boundaries subsequently changed by the commissioners, although the affidavits of two signers of the petition were not filed to show the jurisdictional facts required, Sec. 5 of the Act of 1879 being permissive and not mandatory; that Sec. 78 of the Act of 1885 legalized the acts and proceedings of the commissioners in establishing the district, informality alone being complained of; and that appellant, as a signer of the petition, is estopped from questioning the legality of the organization of the district.

3. The curative act of 1885 must be liberally construed to promote drainage and the reclaiming of wet and overflowed lands.

4. The common law writ of *certiorari* is not a writ of right and whether it will be granted, especially as to a private person, is largely a matter of discretion.

[Opinion filed December 9, 1887.]

APPEAL from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

Messrs. W. R. S. HUNTER and SHERWOOD & JONES, for appellant.

Messrs. HOPKINS, ALDRICH & THATCHER and J. A. RUSSELL, for appellees.

LACEY, J. This was a writ of *certiorari* petitioned for originally by C. P. Wadley, Wilfred Reed, John Reed, Mary Barts, and William Wisher, against the appellees. The petition was filed in the Circuit Court June 11, 1884, and an order made by the Circuit Judge to whom the application was made for a return, to be made by said commissioners at the next October term of the court. No further action was taken in the premises until the October term, 1886, at which time the drainage commissioners, who were made parties in person, were stricken out by order of the court. On the trial of the cause, in the court below, it appeared to the court that all the petitioners had released all the rights they may have had originally to question the legality of the drainage district by releasing the right of way over their respective lands, thereby

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acknowledging the legal existence of the district. Thereupon counsel for the petitioners asked for and obtained leave to amend their petition by inserting the name of appellant as co-petitioner with the original petitioners. On the hearing of the cause the said petition was dismissed and judgment rendered against the petitioners for costs. To reverse this judgment this appeal is taken. The counsel for appellant contends that there was no legal organization of the district under the Act of 1879 and amendatory acts of 1881, and that the curative clause of the statute on drainage of 1885 did not validate the acts of the commissioners had under the former acts. One of the main points of objection that the appellant brings to the record, is that it fails to show that the commissioners had before them, on August 25, 1883, at their meeting to consider the question of granting or rejecting the prayer of the petition, the proper proof to show the jurisdictional facts that "the persons whose names are signed to the petition are a majority in number of all the adult owners of land in the district, and that the signers owned more than one-third of the land situate therein, and for that reason the record should be quashed." Sec. 5 of the Drainage Act of 1879 provides, that it shall be the duty of the drainage commissioners to meet at the time and place mentioned in the notice, etc., and "that they shall thereupon proceed to ascertain whether the said petition contains the signatures of a majority of the adult persons owning land in said district, and that they are the owners of more than one-third of the land situate in said district, and the affidavits of two or more creditable signers of said petition, that they have examined the same and are acquainted with the locality of the district, and that they believe that said petition is signed by a majority of the adult owners of land in said district, and that said signers are owners of more than one-third of the land in said district; and the same may be taken as *prima facie* evidence of the facts set forth in said petition as against the owners of land in said district, and conclusive evidence against all persons signing said petition, that they have accepted the provisions of this act as to the assessment of benefits and damages thereunder."

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In proceeding to ascertain the above facts required by the act, the record fails to show that the affidavits of two or more of the signers of the petition were taken by the commissioners as the said act provided might be done, but the commissioners made a finding of said facts as follows: "From examination, it appears to said commissioners, and they do so find, that the persons whose names are signed to the above named petition are a majority in number of the adult owners of land in said proposed district, and that the signers own more than one-third of the lands situate therein." Thereupon the commissioners "declared in favor of the drain and authorized E. O. Rood to confer with County Surveyor W. H. Pease, to survey and map the route of the same, and to report to an adjourned meeting of the board Saturday, September 8, 1883.

The point of the objection is that the record failing to show that two signers of the petition filed affidavits, the facts could not, under the provisions of the statute, be ascertained by the commissioners in any other way; that the statute should be regarded as imperative and mandatory and not directory or permissive merely; that these facts are jurisdictional, and without their being legally found, and so appearing by the record, the organization is illegal, and that the record should be quashed. This objection will be noticed farther on.

Another point of objection is as follows: The appellant further insists that the record shows that on the 22d day of September, 1883, to which day the meeting had been adjourned from September 8th, and to which meeting the county surveyor made his report, with his maps and estimates of the cost of the proposed drain, and on which day the final organization of the district was effected, and in which organization the commissioners changed the boundaries of the said district from those proposed in the original petition, so as to exclude 720 acres of land from and take in 600 acres to the district as it was finally organized, without amending the petition, that therefore counsel object that there is no record of any amendment to the petition or any new signers to the old one, and that there was no affidavit of two signers of the petition showing the existence of the jurisdictional facts as required by the act above recited.

Sec. 9 of the Act of 1881 provides for a change by the commissioners of the proposed drainage district from what the original petition may call for, and it is admitted by the appellant's counsel that such change may have been in this instance legally made, but he insists that there must be an amendment to the petition. We find no provision in the statute requiring that the petition must be changed or amended, and we do not think it necessary. When once the commissioners obtain jurisdiction by a petition, and have examined it and found it complies with the law, and orders in favor of the drain, they may change the boundaries of the district under Sec. 9. The commissioners have then acquired jurisdiction and may proceed to act, and no change in the petition is required. The maps of the surveyor and the final order of the commissioners conforming thereto, ordering the formation of the district by number, is sufficient to show the boundaries of the district. Sec. 9 provides that the commissioners "shall permit additional signatures to be made to the petition by any adult person or persons owning land in, or owning lands desired to be taken into such proposed district, to the end that a majority of the adult owners of land in the district, or as finally to be organized, and who shall be the owners in the aggregate of more than one-third of such land, shall be signers to the petition, which facts said commissioners shall find and put such finding in writing, and the same shall be signed, and the clerk shall enter the same in his record, which finding shall be conclusive." As far as the commissioners are concerned, they have no power to compel any one to sign the petition. That is a voluntary matter. The necessary jurisdictional facts may exist even after the change without any new signatures.

As to the point first made by the appellant, that the commissioners had no right to find "that the petition was signed by a majority of the adult owners of the land in the said district, and that the signers are owners of more than one-third of the land in the district" by any other means than from the affidavits of two of the petitioners, it is not well taken. The statute says such affidavits *may* be taken to establish such fact, not that they *shall* be. It is only one of the modes by which

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the commissioners may be informed of the existence of those facts. They may ascertain them, for any provision in the statute to the contrary, by any means they think proper. The commissioners, however, failed to enter any finding of record of the facts, at the time they made the final order establishing the district, as to the sufficiency in number of signers of the petition for the new district, as the statute required, but this is not complained of in appellant's brief, and we will not specially notice it, except generally, hereafter.

The next question arising, and which has been argued on both sides is, did Sec. 78 of the Drainage Act of 1885, legalize all the acts of the commissioners in establishing the district, whether irregular or not. That section of the Drainage Act of 1885 (Session Laws of 1885, page 107,) provides as follows: "The acts and proceedings done, and rights acquired under either of the foregoing acts, if in substantial conformity to law shall not be held to be void from merely technical informality of proceedings where no substantial rights of persons or property are adversely affected; and the same principles shall apply to this act. All drainage districts heretofore organized under any one or more of the acts hereby repealed shall be held and hereby are declared to be legally organized, and the assessments made therein shall be held to be legally made. This act, as well as the acts repealed, shall be liberally construed to promote drainage and the reclamation of wet and overflowed lands, and the making the assessments and taxes therefor." The acts under which these proceedings were had were repealed by the foregoing act from which the above section is taken, except as to proceedings under the old acts.

There can be no question that the appellee in this case was duly legalized as a drainage district under the above section, unless, perchance, some substantial right of appellant's property was affected by so doing. The points made are all technical in their character. The amendment of the petition after territory had been added, if required at all, the manner of proving the necessary facts to show that the requisite number of signers' names were attached to the petition, whether by the affidavit of two of the signers or otherwise, and the neces-

sity for the commissioners to preserve any proof at all either by their findings or the record of the same, were mere regulations of the former acts, and may be regarded as technical requirements. If the legislative act, in the first place, had not required those things to be done, the district could have been just as legally organized without them. The omissions complained of, if omissions they were, must be regarded as mere "technical informality of proceedings." One of the substantial rights under the former Drainage Act, may be, that there must have been, when the district was formed, at least a majority of all the adult owners of land in the district and owners of at least one-third of the land in the aggregate signing the petition, and in favor of the enterprise. This may have been, and probably was the case in this instance, though the record of the commissioners may not show it. In case the legal number of names was attached to the petition no substantial right in that particular is violated by legalizing the "acts and proceedings" done by the commissioners. *Prima facie*, at least, the organization is good. The record of it is legal and can not be attacked in a *certiorari* proceeding, where such question is alone tested by the record. It is only a technical rule of law that requires, in case of inferior tribunals, everything to be presumed against its record that does not affirmatively appear in it. A liberal construction at least, as we are compelled to give this curative act, would require us to hold that the record as a record is legalized in all cases where only informality is complained of. If there were not the requisite number of signers to the petition, and that fact is a substantial one of which appellant can complain, he ought for his remedy to be referred to some tribunal where he should take the affirmative. The policy of the law is, as declared by the act, "to promote drainage and the reclaiming of wet and overflowed lands and in the making and collection of assessments and taxes therefor." Can this be effectuated by declaring void districts created for such purpose on trifling technicalities?

We are also of the opinion, aside from the foregoing considerations, that the appellant is estopped from suing out this

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writ of error. He was a signer of the petition and remained upon it until the district was fully organized, although by the act he might have taken his name from it. He must be regarded as knowing what was being done, an actor and promoter of the formation of the district and as agreeing to the irregularities. The statute under which the proceeding was had provides that "the signing of any petition referred to in this act, shall be taken as conclusive against the persons so signing that they have accepted the provisions of this act and of the act to which this is an amendment, as to assessments and benefits and damages therein." If the act is accepted and the assessments, benefits and damages are accepted, there is little more in pecuniary interest that the appellant has in the existence of the district; certainly he can not be injured by it—only benefited; and by the use of his name and influence in part the record he now complains of has been made.

The common law writ of *certiorari* is not a writ of right, and whether it will be granted or not, especially as to a private person, is largely a matter of discretion, although the discretion is not an arbitrary exercise of power. A person is estopped to insist on a writ of *certiorari* where he was a promoter of the making of the record, and from saying those things he caused to be performed are illegal and void. *Board of Supervisors v. Magoon*, 109 Ill. 142. Aside from the statutory estoppel against appellant, as a signer of the petition for the organization of the district and its legalization by the act of 1885, above quoted, we are of the opinion that after promoting the formation of the district and accepting the benefits under the act, which the law conclusively presumes he did by the act of signing the petition, he can not even at common law in a proceeding by writ of *certiorari* be allowed to question the legality of the record organizing the district.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

Eckley v. Clark.

CHARLES ECKLEY ET AL.

V.

THOMAS CLARK ET AL.

Administration—Settlement—Bill to Impeach Final Account—Burden of Proof—Evidence.

After the settlement of an estate the correctness of the administrator's final account is presumed. Where a bill is filed to impeach such an account the burden of proof is upon the complainant.

[Opinion filed May 27, 1887.]

APPEAL from the Circuit Court of Warren County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLIAM K. STEWART and R. J. GRIER, for appellants.

Mr. JOHN PORTER, for appellees.

LACEY, J. This was a bill in equity filed in August, 1876, by the heirs of Patrick Clark, deceased, against the appellant, Charles Eckley, who was the administrator of the estate, and his sureties on the administrator's bond, for the purpose of impeaching a final account filed by the said administrator on final settlement of the estate November 21, 1872, and to compel the administrator to render an account for various items not accounted for, and to estimate from this account on the credit side various items which, as appellees claim, were erroneously entered therein.

The bill was demurrable for failure to charge fraud on the part of the administrator, but as it was answered without objection we will treat it as though the account was being re-stated properly. The first error that was committed by the court below was in not holding that the final account was *prima facie* correct, and in not casting the burden of proof on the appellees to show its error, the account having been approved by the County Court.

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The cause upon the coming in of various answers and defaults was referred to the master with instructions to him to take the evidence and state an account. The master complied with the order and took the evidence and stated the account, to which both the appellants and appellees filed exceptions, which exceptions were carried into the Circuit Court, and upon the hearing of such exceptions by the Circuit Court that court rendered a decree against the appellants for \$894.84, consisting of \$523.27 as principal, and \$371.57 interest, being from November 2, 1872, to September 25, 1884.

The first claim charged to the administrator is \$50, paid by John Clark; this item had already been credited to the estate, as he swears, in an item of \$54, as his report shows. The legal presumptions are also in his favor, and this is erroneously charged to him. The next is the amount of the judgment of the administrator v. Francis Clark, which he claims to have paid to the administrator, of \$273.35. The appellees having the burden of proof to establish this claim, failed to overcome such presumption and the testimony of appellant to the contrary, and we think the proof does not establish that Francis Clark ever paid it. It is not necessary to go into a full examination of the evidence. We are well satisfied that the full claim of Mrs. E. Eckley, of \$401.84, paid her by the administrator, should have been allowed him. The evidence entirely fails to show that appellant Eckley had any funds with which he could have paid such claim at the time Mrs. E. purchased it, and it does show that she purchased it with her own funds and she was entitled to charge the entire claim, principal and interest. It was error then to deduct from the administrator's charges an account of such payment, \$66.47, the amount Mrs. E. discounted the claim in her purchase.

We find nothing in the evidence to impeach, in any way, the correctness of the two claims of Hannah Shanks of \$18 and \$15 to the amount allowed, and that would authorize their reduction to \$10 each, which was done; one receipt shows she was paid \$10, and the other \$15, and only one should be reduced to the amount of \$8. There is no evidence to show that the two payments to Thomas Clark of \$10 each were

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duplicates, or that the two attorney's fees of Talliaferro for \$10 each were duplicated. Unless such evidence clearly showed them to be duplicates, the presumption would be that the report was correct.

The reducing of the crier's fee to \$3 is correct; as Hutchins swears he cried but one sale, hence the charges must be duplicated and the law only allowed \$3 fee for such services.

The striking out the allowance of the administrator by the County Court, of \$50 for expenses in settling the estate, was error, as by the law then in force the County Court had the discretion to make the allowance, and that discretion could not now be interfered with by the Circuit Court. See Sec. 175 Chap. 109, Wills, Gross' Statute, 1868. There may have been a mistake in favor of the administrator of \$7.65 in calculating interest on the last real estate note. As to that, as the evidence was not fully abstracted, it can not now be fully determined nor can it be fully determined what effect the non-payment of a portion of the lost note had on it. We leave that matter to be adjusted by the court below upon final hearing as it may determine.

The court below did not err in refusing to allow the interest claimed by appellees, there being no sufficient evidence to support such a charge.

Although the Statute of Limitations may not have run against this action, yet where years have been allowed to elapse before commencing suit to compel a re-adjustment of account, the evidence should show clearly that the settlement was erroneous, and all presumption should be indulged in favor of the administrator and his securities. They are taken at great disadvantage by this long delay. Of course it was error to order execution against the administrators of some of the sureties who have died, but that can be corrected on another hearing; so it is not necessary to make any further order concerning that matter.

The decree of the court below is reversed and the cause remanded to the court below with instructions to proceed in accordance with this opinion.

Reversed and remanded.

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REHEARING.

[Opinion filed December 15, 1887.]

Per Curiam. The appellees file their petition herein for a rehearing. The error claimed to have been committed by this court in its decision, and most particularly relied on, is in holding that the proof did not establish that Francis Clark ever paid the judgment of \$273.35 rendered in favor of the administrator against him.

In regard to the above item, we said in the opinion filed that "the appellees, having the burden of proof to establish the claim, failed to overcome such presumption and the testimony of appellant to the contrary, and we think the proof does not establish that Francis Clark ever paid it. It is not necessary to go into a full examination of the evidence."

Since the petition has been filed, we deem it no more than proper to give our reasons for arriving at the conclusion we did more at large. They are as follows: It is now contended in the petition that a certain receipt given by John Shaffer to Francis Clark, dated September 30, 1871, for that sum, to be applied "on his account to the estate of Patrick Clark," and other evidence in connection, establishes the fact that appellant should be charged with it. An order is shown from the administrator to William Morris, directed to Francis Clark, requesting him to pay Morris this sum, "being amount due estate of Patrick Clark from you on judgment."

Also the administrator, in his final report, credits himself with this item as follows by amount paid out as follows: "September 30, 1871. John Shaffer on judgment \$273.35."

It is claimed that this evidence proves that the appellant Eckley got the benefit of this amount and that it was not charged to him on the debtor side in his final account. But we think this is a misapprehension of the evidence. There does not appear to be any charge in the final report of the appellant of an item specifically covering this judgment. But the administrator charges himself with two promissory notes of \$850, each given to him by Francis Clark, John Clark and

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Royal Ranney, dated May 9, 1868, due in six and twelve months respectively, given as sale notes for sale of real estate left by deceased to pay debts. We think that the evidence pretty clearly shows that about \$320 of the note due in six months was never paid, unless this sum of \$273.35 be applied on that account.

It is true that John Clark testifies that he paid the balance of the note in full on April, 1869, in Oquawka, and that it had been in his possession ever since until the winter or spring before his deposition was taken. But appellant and his attorney Taliaferro both swear that the note was put into the latter's hands to collect and had never been taken out till just before the final report was made, November 21, 1872, and that, to the best of their belief, it was filed with the papers as estate papers, and that only three payments had been made on it. All these payments, amounting only to \$530, Taliaferro received and indorsed on the note in his own handwriting. But the appellant charged himself with the entire amount of the note in his final report.

A preponderance of the evidence shows that only that amount of the note had been paid, unless the \$273.35 should be allowed against it. This is the effect of what was done by the settlement. The administrator charged himself in general account with the note, and took credit in the same account for this sum, as paid out for the benefit of the estate. The account, as rendered, was approved by the court and the administrator discharged, the court finding, in the final order, that the "administrator had completely settled the estate and there were no assets remaining in his hands." This was *prima facie* evidence that everything had been completely settled. If it had been necessary to put this sum of \$273.35, on the debtors' side of the administrator's account in addition to what was already there, it was the duty of the court to see that it was done, and *prima facie* we must presume all was done that the law and the facts required. The presumption of law is in favor of administrator's reports and allowances. *People v. Lott*, 36 Ill. 447; *Bond v. Lockwood*, 33 Ill. 212; *Lupton v. Janney*, 13 Pet. 381. In the latter case above cited Judge Story

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says: "Nothing is more clear than the general rule that *ex parte* settlement of accounts of this sort in the Orphans' Court, being matters within the knowledge and jurisdiction of the court, in the administration of assets, are *prima facie* evidence of their own verity and correctness; and the *onus probandi* is upon those who seek to impeach them."

The evidence tending to show that the judgment was paid by Francis Clark, is not so strong as to overcome this presumption and the evidence introduced by appellant. The judgment itself is not satisfied of record; appellant and Taliaferro both swear, to the best of their judgment, it was not paid. Wm. Morris swears, to the best of his recollection, he gave no order to Shaffer on Francis Clark to pay the judgment to Shaffer and knows nothing about the order from Eckley to him on Francis Clark, set out in the record, and never saw it till the last week immediately prior to the time his evidence was taken.

Francis Clark has had an injury on his head that impairs his recollection. He swears he paid all the \$175 account (supposed to have been with interest the amount of the judgment) to John Schaffer except \$30, for which he gave his note, which he never paid. He swears Schaffer brought him an order from Morris. He would not pay any money to Eckley and this is why, as he swears, Schaffer brought the order from Morris to him. He knew nothing about the order from Eckley to Morris above referred to.

This evidence, in our opinion, is not sufficient to establish the payment of the judgment by Francis Clark. After the lapse of so long a time from the approval of the final report and the discharge of the administrator to the filing of the bill herein, the impression of the facts relating to the special items of account has become dimmed in the minds of the witnesses, and for this and other reasons the final settlement ought not to be lightly disturbed. Clear proof of substantial error should be required. John and Francis Clark, now parties complaining herein, were present at the time of filing the last report or knew of it soon afterward, and this alleged error concerned them particularly, yet neither of them made any objection for a long time afterward, and Francis was in favor of letting the settlement stand.

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All is said in our opinion, heretofore filed, as to the other items and the rules of law applicable, that we desire to say. We adhere to that opinion. The motion for a rehearing is denied.

Motion denied.

THE PEOPLE OF THE STATE OF ILLINOIS, FOR USE, ETC.,
V.
SILAS BRUMBACK ET AL.

Dram Shops—Death Caused by Intoxication—Action on Bond of Liquor Dealers—Evidence—Conflict of—Instructions—Pleading.

1. Where the evidence is sharply conflicting the instructions must accurately state the law of the case.

2. An instruction which calls special attention to some particular part or parts of the evidence is erroneous.

3. It is error to give an instruction which is not based upon the evidence.

4. In an action brought on the bond of certain liquor dealers to recover damages for causing the plaintiff's husband to become a drunkard and thereby causing his death while intoxicated, it is *held*: That an instruction from which the jury must have understood that the defendants were not liable, although the deceased was killed in consequence of being drunk from liquors furnished in whole or in part by the defendants, is erroneous; that the declaration, charging that he was killed by an engine and train of cars, would sustain a recovery if any part of the train struck and killed him; and that the admission of the opinions and surmises of certain witnesses, who saw the deceased after his death, as to the cause of death, was improper.

[Opinion filed December 16, 1887.]

APPEAL from the Circuit Court of Iroquois County; the
Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. KAY & EUANS, for appellant.

Messrs. DOYLE, MORRIS & PIERSON and J. B. RICE, for
appellee.

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WELCH, J. This was an action of debt brought on a liquor bond. The declaration charges that the defendants, Silas Brumback and Morgan Hix, had obtained a license to sell and give away intoxicating liquors in the village of Milford in Iroquois County, and that they, with the other defendants, John Wood, Thomas Jones and Isaac Bennett, executed the bond sued upon; that during the time said bond was in force, said Brumback and Hix sold and gave away to William Laird, husband of Matilda J. Laird, the appellant, intoxicating liquors whereby they caused him to become a habitual drunkard; that on the 24th day of April, 1882, said bond still being in force, said Brumback and Hix sold and gave away to said William Laird intoxicating liquors, whereby he became intoxicated, and being so intoxicated went upon the railroad track of the Chicago & Eastern Illinois Railroad Company where it passes through said county, and while so intoxicated then and there was struck by an engine and train of cars on said railroad company's track and killed; and that appellant, then being his wife, was deprived of her means of support and sustained damages to the amount of \$3,000. Plea of *nil debit* for all defendants and *similiter*. Trial and verdict for defendants. Motion for new trial. Motion overruled and judgment on verdict for the defendants, from which this appeal is taken. Various errors are assigned. There was a sharp conflict in the evidence upon the issues presented by the pleadings. In such case it was absolutely essential that the instructions given by the court should accurately state the law. *Neuerberg v. Gaulter*, 4 Ill. App. 348, and authorities cited; *Stearns v. Reidy*, 18 Ill. App. 582; *Wabash Ry. Co. v. Henks*, 91 Ill. 406; *Cushman v. Cogswell*, 86 Ill. 62; *Nicholson v. Mitchell*, 16 Ill. App. 647; *Harvey v. Miles*, 16 Ill. App. 533.

The fifth instruction given for the appellee calls special attention to certain unimportant circumstances, and singles out particular testimony and calls special attention thereto. This form of instruction has frequently been declared vicious by our Supreme Court. In *Callaghan v. Meyers*, 89 Ill. 566, it was said: "The practice would be pernicious to permit each party to ask an instruction on every item of evidence in the

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case, and, if this was sanctioned, to be consistent, we would be compelled to sanction such a practice. All know, and the jury fully understand, that all evidence admitted on a trial is for consideration, and to permit a single item or a few items to be selected and they especially directed to consider it, or them, gives too much prominence to such evidence to be fair to the other party, and we have so held in numerous cases."

The sixth of appellee's instructions told the jury "that to entitle the plaintiff to recover in this case, it must appear from the evidence that the death of William Laird was caused by the acts of the defendants, or one of them, as charged in its declaration, and that his death was not the result merely of accident." The jury would have understood from this instruction, that although they believed from the evidence that the deceased was drunk from liquor furnished in whole or in part by the acts of the defendants, or some of them, as charged in the declaration, and whilst in that condition and in consequence thereof, he stumbled and fell as the train passed and was killed, yet the defendants would be excused. This is not the law; defendants would be liable in such case. In *Brannan v. Adams*, 76 Ill. 331, 335, it was held: "If the appellants sold Mitchell liquor that made him drunk, and whilst drunk from the liquor they sold him and as a consequence thereof he fell and broke his leg, and by reason thereof it became necessary that appellee, or some other person, should take charge of him, and to be kept by him until he recovered, and appellee did so care for him, he is entitled to recover." This instruction is erroneous upon another ground, that there was no evidence upon which to base it. *Leckie v. Brown*, 43 Ill. 372; *Prescott v. Maxwell*, 48 Ill. 82.

The seventh instruction for appellee told the jury they must not find for appellant unless Baird was killed by the engine. "If the wounds were received in some other manner or resulted from some other cause then they should find for the defendants." The declaration charged that he was struck and killed by a passing engine and train of cars. If any part of the train struck and killed him, under this declaration, appellant was entitled to recover.

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We think, however, that by far the most serious and manifest error in the record was in allowing a large number of the witnesses, who saw the deceased after his death, to give their opinions and surmises as to how Laird came to his death. It can not be doubted but that this wholly incompetent testimony was calculated to and probably did influence the jury in finding their verdict.

For the errors herein indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

E. SANFORD AND GEORGE WILKINSON

V.

CASSA KANE.

Mortgages—Power of Sale—Who may Execute—Usury—Equity—Legal Rights—Outstanding Title—Right to Acquire.

1. Where a mortgage, containing a power of sale, was given to secure a promissory note and the note has been assigned, the power can only be executed by the assignee of the note.

2. The joinder of a wife in a deed by her husband, merely to release her inchoate right of dower, does not bar her from acquiring an outstanding title and asserting it against her husband's grantee.

3. Upon a bill filed to cancel a deed executed under a power of sale contained in a mortgage, and to be permitted to redeem, it is *held*: That the power was improperly executed by one who was not the assignee of the note; that the note was usurious; that the complainant, as one of the makers, can avail herself of the usurious character of the note; and that her interest in the property entitles her to redeem.

[Opinion filed December 16, 1887.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

This was a bill filed by the appellee against the appellants to cancel a deed executed by Wilkinson to Sanford, to the

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southwest quarter of the southwest quarter of section 7, town 27 north, range 11 west, Iroquois County, and to be permitted to redeem from a mortgage of said premises, executed by Morris Kane and the appellee to Sanford, on the 20th of July, 1875.

The bill alleges that on the 20th of July, 1875, Morris Kane borrowed of Sanford the sum of \$475, for three years, and agreed to pay him, at the Chemical National Bank, of New York, the sum of \$500, with interest at ten per cent. semi-annually; that the extra \$25 was paid as a bonus for said money; that to secure the payment of said money, Morris Kane gave to Sanford his note for \$500 and a mortgage on said premises, with power to sell the said property. Said note and mortgage was executed by Morris Kane and the appellee; that at the time of the borrowing of said money, and of the execution of the note and mortgage, Morris Kane was the owner of the said premises, and the appellee was his wife; that said note was indorsed by Sanford to Edgar G. Wittlesey, who had never indorsed the same to any one else; that on February 21, 1876, Morris Kane conveyed said premises to John Kane for a valuable consideration, and that on October 3, 1881, John Kane and wife conveyed said premises to the appellee, and that she is now the legal owner of said premises; that Morris Kane paid on said note semi-annual interest at the rate of ten per cent. to and including the 20th of July, 1878; that Wilkinson, who claimed to be the assignee of the mortgage, advertised that he would sell said land at Watseka, at 2 o'clock P. M., on the 16th day of October, 1878; that at said sale Sanford was the purchaser, and Wilkinson executed to him a deed therefor; that Sanford immediately took possession, and has been, and now is, receiving the rents and profits therefrom.

The bill alleges that no power of sale was vested in said Wilkinson under said mortgage; that no assignment of the note which it was given to secure was ever made to him; that no title passed to Sanford by the sale and conveyance of Wilkinson to him.

The bill prays that an account may be taken of the amount

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due on said mortgage, and that she may be allowed to redeem on equitable terms, and that the deed from Wilkinson to Sanford be canceled and held for naught. Appellants' answers deny usury, and deny that the loan was made by Sanford to Kane, but state that the loan was procured by Sanford, as agent of Kane, from Whittlesey, who furnished the money, and that the amount furnished by him was \$500. They deny that the mortgage was given to secure the payment of the note, and claim that they were independent of each other; deny that Sanford had any interest in the mortgage at time of sale. They admit that Sanford took possession, but deny that he receives any more from the rents than was expended in payment of taxes and to keep up the improvements. They claim that the sale made by Wilkinson to Sanford is valid. They deny that appellee has any interest in the premises, and claim that she and her husband, on the 27th of March, 1879, conveyed said premises to J. C. Parr by warranty deed, subject to this mortgage. Replication filed.

The cause was heard on bill, replication and proof, March 24, 1884. The court finds Cassa Kane owner of the property at the time of filing of bill; that Morris and Cassa Kane gave a note of \$500, and secured the same by mortgage; that said note was assigned to Whittlesey; that the mortgage was also assigned to Whittlesey by Sanford; that Whittlesey, by separate deed, assigned the same to Wilkinson, October 16, 1879; advertised and sold to Sanford for \$300 the said land; that Sanford has had possession and collected rents. The court further finds that the bill claims that the note embraced usury. The court decreed that the sale by Wilkinson to Sanford was null and void; that Cassa Kane had the right to redeem.

The cause was referred to a master to take proof, and state account and report. Exceptions were sustained to the master's final report, and he was ordered to restate the account. Appellants filed exceptions to the master's second report, which was overruled by the court, and "decree that appellee pay to the clerk, within ninety days, \$299.96, with interest at six per cent. from June 10, 1886, and all costs, the said sum to

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be for the use of defendants in such portions as the court shall at the next term of this court determine; and in default of payment, all the rights of appellee in and to the said land be, and the same is hereby determined;" and it was further decreed that upon the payment of said sum and interest by said appellee, all right of Sanford and Wilkinson, or any one claiming by or through them to the property under said mortgage, should cease on the payment of the said money, and all of their rights to vest in the appellee. Defendants except and pray an appeal. Various errors are assigned.

Mr. E. SANFORD, for appellants.

Mr. ROBERT DOYLE, for appellee.

WELCH, J. The first question we deem material to be considered in this case, is, whether the power of sale contained in the mortgage has been properly exercised by a party authorized by law to execute it. There was at the time the mortgage was executed a note given to E. Sanford, the mortgagee, which note was by him assigned with the mortgage to Whittlesey. There is no claim made that Whittlesey assigned the note to Wilkinson, but it is claimed that he assigned the mortgage. As held in *Mason v. Ainsworth*, 58 Ill. 163, "Neither the debt secured, nor the mortgage itself, was assignable at common law, nor have they been made assignable by any statute of this State. Only a certain class of choses in action, such as notes, bonds, bills, and other instruments in writing, for the payment of a specific sum of money, are assignable by the terms of the statute. "In equity the assignment of the debt will carry with it the mortgage." "Mortgages to secure indebtedness have never been regarded as assignable in the sense of negotiable paper so as to vest the legal title in the assignee." "The rule is settled, at least in this State, that such a power of sale must be executed by the original mortgagee, or in case the debt is of such a character that it may be legally assigned, so as to vest the legal title in the assignee, then the assignee himself must exercise the

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power." *Pardee v. Lindly*, 31 Ill. 174. Whittlesey, to whom the note and mortgage were assigned, could alone execute the power. If the mortgage was not given to secure a debt that was assignable, no assignment of the mortgage could vest the power of sale in an assignee. The power of sale would remain in and could be executed by the mortgagee. Although we are satisfied from the evidence that the mortgage in this case was given to secure the note, yet that fact is not important. If it was given to secure the note, it having been assigned to Whittlesey, the power could alone have been executed by him. If it was not given to secure the note, then the power of sale could only have been executed by Sanford, the mortgagee.

In neither view had Wilkinson the right to make sale of said premises under the power of sale in said mortgage; and his deed under said sale to Sanford must be held not to have passed the title.

It is also insisted by counsel for appellants that the court erred in finding the mortgage usurious. We are satisfied from the evidence that the money was borrowed from Sanford; that he deducted from the face of the loan five per cent.—four per cent., \$20, for himself, and one per cent., \$5, for his agent, and gave to Kane \$475 and took his note and mortgage for the sum of \$500, payable three years after date, with interest at ten per cent., payable semi-annually. That such transaction was usurious, we have no doubt. It is also insisted by counsel for appellants, that appellee had no interest in said property at the time of the sale.

This is a bill filed to redeem from the mortgage and claiming that there has been no valid sale under it, and asking that the conveyance made under said pretended sale be set aside and held for naught. We have held that Wilkinson had no right to sell under the power in said mortgage, and that no title passed by his conveyance to Sanford.

The appellee derives her title to this property through a conveyance made by Morris Kane, February 21, 1876, to John Kane, and a conveyance from John Kane and wife to her, executed the third day of October, 1881.

It is insisted by counsel for appellant, that as appellee joined

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with her husband, Morris Kane, in a warranty deed, March 27, 1879, to John C. Parr to said property, said deed being subject to said mortgage, she could not acquire any title or interest in said property hostile to Parr; that whatever title she acquires would, under the deed to Parr, inure to him. We do not assent to this claim. The only interest she had in the property at the time of the conveyance was the inchoate right of dower. She is not responsible on the covenant of warranty in said deed; neither would she be barred from purchasing in an outstanding title, and asserting it as against Parr.

It appears from the evidence of the quit claim deed of Parr to Doyle of said premises, and of Doyle and wife to the appellee, that she is invested with whatever title or interest Parr had acquired through the deed of Morris Kane and the appellee to him. We hold that the deed of Morris Kane to John Kane divested Morris Kane of all title or interest in said premises.

There was no error in the holding of the court that the appellee had such interest in the mortgaged property as gave to her the right to redeem the same. This interest she had as grantee of the property from John Kane and wife. Neither was there error in holding that there was usury in the loan, and that the appellee could avail herself of it. This right was given to her as one of the makers of the note. Being in chancery she could avail herself of all her rights, either legal or equitable. The case of *Essley v. Sloan*, 116 Ill. 391, has no application. We do not deem it necessary to pass upon the other errors in detail, it is sufficient for us to say that we find no merit in any of them. The equity and law of the case are with the appellee. Finding no error in the decree it is affirmed.

Decree affirmed.

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JOHN H. TEDENS

V.

BARRETT B. CLARK.

Mortgages—Deed Absolute on its Face—When a Mortgage—Right to Redeem—Costs.

1. A deed absolute on its face will be considered a mortgage when it clearly appears to have been so intended when executed.

2. In the case presented, it is *held*: That the deed in question is a mortgage, and the complainant has a right to redeem therefrom; and that the court below should have ordered an account taken of the amount due.

[Opinion filed December 16, 1887.]

APPEAL from the Circuit Court of Will County; the Hon. DORRENCE DIBELL, Judge, presiding.

On December '20, 1858, Michael Finlon and wife (from whom both appellant and appellee claim title) executed and delivered to the appellee, Clark, a warranty deed for the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of Sec. 1, T. 37, R. 10; Will County, Illinois, for the expressed consideration of \$772. Said deed contained an error in description. The parties to it intending that the N. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 1, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 1 only, should be conveyed. On the same day Clark executed an agreement to convey said premises to Finlon in fee simple, on the 20th day of December, 1860, for \$772. This agreement was intended only to embrace the eighty acres, as stated above, but the draftsman made the same mistake in the description as in the deed. Clark, to correct the mistake in the description in the Finlon deed to him, deeded to Finlon the east forty acres. On December 5, 1861, Finlon and wife executed to H. H. Cody, as trustee, a trust deed upon all of the said N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 1, and also upon part of the W. $\frac{1}{2}$, N. E. $\frac{1}{4}$ of Sec. 2, T. 37 N., R. 10, to secure three

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notes given to James Burns; one note for \$52.50, one for \$162.50 and one for \$94.26. Said notes were payable three years after date, with interest at ten per cent. per annum. On March 7, 1863, a settlement was had between Clark and Finlon, and papers to the following effect were executed and passed to the respective parties: "This is to certify that Barrett B. Clark, of the town of DuPage, County of Will and State of Illinois, and Michael Finlon have settled all accounts, to this date, March 7, 1863. MICHAEL FINLON."

"This is to certify that Barrett B. Clark, of the town of DuPage, County of Will and State of Illinois, and Michael Finlon have settled all accounts to this date, March 7, 1863."

"BARRETT B. CLARK."

Finlon remained in possession of the land after the deed to Clark, and was in possession in 1864, when he went into the army. On his return from the army, in 1865, he found John Weiss cultivating the west forty as tenant of Clark, and so continued to 1881. The east forty was never out of the possession of Finlon.

On July 7, 1874, Finlon paid on the Burns notes, \$200, which was the sole payment made on them. The notes were indorsed to appellant by Burns. Default having been made in their payment, he applied to H. H. Cody, trustee, to sell said premises. Notice of sale was given as required by law, and on July 25, 1883, sale of said premises was made, and appellant became the purchaser for the sum of \$1,900. On August 1, 1883, the trustee conveyed to the appellant said N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of said section 1, T. 37, R. 10, and Finlon, as his tenant, is in possession thereof. Appellant by his bill claims that the deed executed by Finlon and wife to Clark, on December 20, 1858, was a mortgage, and that it has been fully paid. And that said deed is a cloud upon his title, acquired through the sale under the trust deed of Finlon and wife to Cody, which ought to be removed, and that, if it should be held that Clark has not been satisfied or paid in full, then he claims he has a right to redeem by the payment of what may justly be due and owing Clark on an

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accounting to be had. Appellee denies that the deed executed to him by Finlon and wife is a mortgage, and asserts that it was a conveyance in fee simple, and that he is absolute owner thereof; denies that appellant is entitled to any relief under his bill. The Circuit Court on hearing, dismissed bill, from which this appeal is taken.

Mr. D. BLACKMAN, for appellant.

Mr. BENJ. OLIN, for appellee.

WELCH, J. Was the conveyance of December 20, 1858, of Finlon and wife to appellee, an absolute sale and conveyance, or was it intended only as a security in the nature of a mortgage? The statute declares, that "every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage."

It has been repeatedly held by the Supreme Court that a deed absolute upon its face, is not to be considered as a "mortgage," unless it be made to appear clearly, to have been so intended at the time of its execution. *Sutphen v. Cushman*, 35 Ill. 186; *Lindauer v. Cummings*, 57 Ill. 195; *Price v. Karnes*, 59 Ill. 276; *Remington v. Campbell*, 60 Ill. 516; *Magnusson v. Johnson*, 73 Ill. 156. Upon a careful examination of this record, we are of the opinion that the conveyance of December 20, 1858, of Finlon and wife to appellee, is a mortgage; that the original object of this conveyance as intended and understood by the parties was for the purpose of securing the sum of \$772, due from the grantor to grantee.

Appellee states in his bill against Finlon and wife and John Weiss, filed April 25, 1868, and amendment filed and sworn to August 9, 1870, "that the original object of said conveyance was to afford your orator security for his said debt; that to carry out this object your orator, at the time and on the occasion of the delivery to him of said deed of conveyance, made, executed and delivered to said Finlon an agreement bearing even date with said deed, to reconvey to him (said

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Finlon) said premises described in said deed, upon condition that the said Finlon should pay to your orator the amount so due him, on or before the 2d day of December, 1860." The amount of money which Finlon owed, stated in the contract, was the sum of \$772. The parties did not treat the conveyance as a sale. The grantor in the deed remained in possession and use of the property, as owner, after the deed was made, as he did before. Finlon says: "I did not leave the eighty acres after I gave the deed, and have not left them yet. I have had possession of the middle forty acres, between my home and the west forty, ever since I bought of the Canal Trustees.

"I was at home about 1864, and went into the army. After the deed to Clark, two or three years after, I was in the army about two years. When I came back I found John Weiss cultivating the west forty acres. After John Weiss went on this forty acres, down to 1881, Clark had it and rented it. I was occupying and using this eighty acres when I made the trust deed to Cody."

Finlon and wife both state that they understood the conveyance to be a mortgage, intended only as security for the payment of the sum of \$772, due the grantee. It is contended that under a settlement made between the parties on the 7th day of March, 1863, the deed should be regarded as an absolute conveyance. The title of appellant is acquired under a sale made under the trust deed executed by Finlon and wife to Cody, on December 5, 1861. No agreement of Finlon made with Clark in 1863 could in any way affect or defeat the rights of appellant acquired under the Cody deed. Appellant, by his purchase under that deed, became the owner of the property, subject only to the mortgage of appellee, but could not defend against the mortgage on the ground of usury entering into its consideration. In *Clark v. Finlon*, 90 Ill. 245, the litigation was between mortgagor and mortgagee, and the consideration purged by the master of all usury, which was proper as between such parties. The decree of the Circuit Court, dismissing appellant's bill, was erroneous. The court should have found that the conveyance of December 20,

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1858, of Finlon and wife to Clark, to the premises in controversy, to wit, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of section 1, town 37 north, range 10, east of the 3d P. M., Will County, State of Illinois, was a mortgage, and as such the appellant had the right to redeem therefrom. An order should have been made, that an account be taken of the amount due Clark on said mortgage, on the basis of allowing to Clark the principal sum with interest thereon at the rate of six per cent. per annum, deducting therefrom all just credits, including in such credits all rents and profits received by Clark, or for which he may be accountable under the rule laid down in *Mozier v. Norton et al.*, 100 Ill. 63, less such sums as Clark may have paid for taxes, and necessary repairs on said premises. If, on such accounting, nothing should be found to be due on said mortgage, it should be declared satisfied. But, if on such accounting anything should be found due on said mortgage, appellant is entitled to a decree giving to him the right to redeem, on the payment of the amount so found due, on equitable terms to be fixed by the court. Appellant should be required to pay the costs in the Circuit Court.

The decree is reversed and cause remanded for such other and further proceedings in conformity with this opinion as may be necessary and proper.

Since this appeal was taken the appellee has departed this life. His death having been suggested, his administrator was substituted as appellee.

Decree reversed and cause remanded, appellee to pay the costs of this court; costs to be paid in due course of administration.

Decree reversed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1886.

WILLIAM A. BOLEY
V.
BARNARD BARUTIO.

*Landlord and Tenant—Tenants in Common—Rent—Implied Contract—
Notice—Evidence—Error without Prejudice.*

1. The mere occupancy of the entire property by one of two tenants in common does not render him liable to account to his co-tenant for rent.
2. The relation of landlord and tenant is not as readily inferred between co-tenants as between strangers, and whether such relation exists is a question of fact for the jury.
3. A promise by a co-tenant, occupying the entire property, to pay rent, may be implied.
4. Where one occupies the premises of another after receiving notice that he will be required to pay rent, he will be bound to pay such rent.
5. An error in the admission of evidence, which could not have injured the appellant, is not a sufficient ground for a reversal of the judgment.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Tazewell County; the
Hon. N. W. GREEN, Judge, presiding.

Mr. WILLIAM DON MAUS and B. S. PRETTYMAN, for appellant.

There can be no recovery at law by one tenant in common against his co-tenant, who merely occupied the premises which both are entitled to possess.

To render one co-tenant liable to another for rent, or use and occupation, there must be something more than occupancy of the estate by one and a forbearance to occupy by the other. The co-tenant, who merely occupies the estate, does no more

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than he has a right to do on his own account. 1 Washburn on Real Property, 2d Ed. 436; Sargent v. Parsons, 12 Mass. 149; Calhoun v. Curtis, 4 Met. 413; Chapin v. Foss, 75 Ill. 280; Sconce v. Sconce, 15 Ill. App. 169.

Mr. T. N. GREEN, for appellee.

WALL, J. This was an action of assumpsit for use and occupation of a warehouse. The verdict was for plaintiff for \$1,020.17, upon which judgment was entered.

The plaintiff and defendant were tenants in common of certain lots in the city of Pekin, upon which they built an ice house at their joint expense. The plaintiff lives in St. Louis, the defendant in Pekin. According to the testimony of the plaintiff, a partition was run through or across the house in the year 1875, and thereafter, by mutual understanding of the parties, the south half was occupied by the plaintiff and the north half by defendant. The defendant had charge of filling the house with ice each year and was paid by plaintiff for filling his part at certain rates per ton. This continued for several years, and until December, 1882, when the plaintiff, learning that defendant was putting up inferior or thin ice, notified defendant not to put up any more such. Defendant had the plaintiff's part about two-thirds filled when this notice was given and drew upon the plaintiff therefor, but the draft was not paid. Plaintiff says he notified defendant in 1883, after he put up the thin ice, that he would charge him rent for his half of the house. Defendant continued to use the whole house thereafter, and it is for this use of plaintiff's part the present suit is mainly brought. A small item for tax and insurance paid a second time constitutes a part of plaintiff's demand, but as to this there seems to be no controversy, and the only item in dispute is the rent.

There was some conflict as to the rental value of the ice house, and there was a sharp difference between the plaintiff and defendant as to the object and purpose of the partition dividing the building and as to the subsequent understanding of the parties. The defendant denied that he had been notified by plaintiff that rent would be charged for the south half.

Where two men own property in common, the mere fact that one occupies the whole property, does not render him liable to account to his co-tenant for rent, and generally the action for use and occupation will not lie unless the relation of landlord and tenant exists. The action is founded upon contract, express or implied. *Dudding v. Hill*, 15 Ill. 61; *McNair v. Schwartz*, 16 Ill. 24. But when it does not appear that the party is an intruder or trespasser on land, or that he holds it against the will of the owner, or that he is to enjoy it without payment of rent, the law will imply an agreement to pay reasonable rent therefor. *Oakes v. Oakes*, 16 Ill. 106.

The law will, in a proper case, imply such an agreement between co-tenants, though the relation of landlord and tenant would not be so readily inferred from occupation, in the case of a co-tenant, as in that of a stranger, and whether such relation existed would be a question of fact for the jury. *Chapin v. Foss*, 75 Ill. 280.

Where one occupies the premises of another after being notified that if he does so he will be expected to pay rent, he is bound to pay such rent. *I. C. R. R. Co. v. Thompson*, 116 Ill. 159.

Applying these principles to the case as stated by the plaintiff, and as his evidence tended to prove, the verdict is right. While there was conflict in the testimony, it was the province of the jury to harmonize, if they could, and if not, to give credit to that which they believed the more worthy of it. We can not say that by this verdict any injustice has been done. On the contrary, we are inclined to believe it is in accordance with the merits of the case.

The action of the court in giving, modifying and refusing instructions, was in harmony with the views above expressed, and we find no error in that respect.

It is urged with some force that the court erred in admitting a letter written by D. C. Boley, who was the brother and at the time the agent of defendant in the transaction of many business matters, including, perhaps, this. The defendant denies that he authorized or knew of this letter, nor is it clear in what way it can be regarded as a part of anything

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done by the agent in behalf of his principal. We are, therefore, inclined to hold the letter was not properly admitted; but the only part of it which relates to this controversy is a statement that the defendant had filled the house partly with thin ice, but had stopped, because so notified by the plaintiff. We do not understand that this was denied by the defendant, and it would follow the admission of the testimony, if error, was not prejudicial, and should not work a reversal. The whole record considered, we have no doubt that if the jury properly weighed the proofs, as it is to be presumed they did, the verdict would have been the same if this letter had been excluded. The judgment will be affirmed.

Judgment affirmed.

BLOOMINGTON MUTUAL LIFE BENEFIT ASSOCIATION
v.
WILLIAM BLUE.

Life Insurance—Mutual Benefit Association—Wager Policy—Question for Jury—Ultra Vires—Practice.

1. Where one insures his life for the benefit of a third person who has no pecuniary interest therein, the question whether the policy is a wagering contract is for the jury.

2. The mere fact that the beneficiary has no pecuniary interest in the life insured does not render the contract void as against public policy.

3. In a case involving the question whether a mutual benefit association, organized under the Act of January 13, 1883, can defend an action on a policy issued for the benefit of one not a devisee or legatee of, nor in any way related to, the insured, on the ground that the contract was *ultra vires*, this court affirms the judgment of the court below, in order to have the question settled by the Supreme Court without delay.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. FIFER & PHILLIPS, for appellant.

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At common law the contract sued on is void on grounds of public policy, for the reason that Blue, at the time the insurance was effected, had no insurable interest in the life of Bailey.

So far as we are aware this court has never passed upon this exact question. It has been held, however, in the case of *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35, that a son not having any pecuniary interest in the continuance of the life of his father, could not legally have the father's life insured for his (the son's) benefit. *Mutual Benefit Ass'n v. Hoyt*, 46 Mich. 473.

There are many cases which, by analogy and upon principle, as fully support the proposition as the Michigan case. These cases hold that a policy, when assigned by the person whose life is insured, is void in the hands of the assignee upon the ground of public policy, provided the assignee has no interest in the life insured. These authorities seem to us to decide the principle of law we contend for as effectually as though they arose upon the exact state of facts presented in this case.

The authorities last referred to are as follows: *Life Ins. Co. v. Sturges*, 18 Kansas, 93; *Gambbs, etc. v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44; *Warnock v. Davis*, 104 U. S. Reports, 775; *Canmack v. Lewis*, 15 Wall. 643.

The spirit and intent of the statute we contend is to prohibit any one from becoming a beneficiary unless included in the class of persons named in the first section of the act. If we are correct in this, then the following authorities are in point, for no contract can have any binding force when made in derogation of the provisions of the statute. *Penn v. Bornman*, 102 Ill. 523; *Ky. Masonic Mut. Life Ins. Co. v. Miller*, 13 Bush, 489; *The Penn. Mut. Relief Ass'n v. Catherine F. Falmer*, 87 Pennsylvania State Reports, 133; *Van Buren v. St. Joseph*, 28 Mich. 399.

The fact that Blue was not related to Bailey was not discovered by the agents of plaintiff in error until after the death of Bailey, and then the money which had been paid by Bailey and Blue in the way of assessments was tendered to Blue, together with the interest which had accrued.

Messrs. KERRICK, LUCAS & SPENCER, for appellee.

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It is the well settled rule of law in this State that a corporation can not plead *ultra vires* to its own executed contracts. *Bradley v. Ballard*, 55 Ill. 413; *Chicago Building Society v. Crowell*, 65 Ill. 453; *Darst v. Gale*, 83 Ill. 136; *Ward v. Johnson*, 95 Ill. 215; *E. St. L. v. E. St. L. G. L. & C. Co.*, 98 Ill. 415; *P. & S. R. R. Co. v. Thompson*, 103 Ill. 187; *West v. Madison Co. Agricultural Board*, 82 Ill. 205.

And the great weight of authority outside of this State is to the same effect. *Morawetz on Private Corporations*, Vol. 2, p. 689; *Green's Brice's Ultra Vires*, 784; *Gold Mining Co. v. National Banks*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621; *Perkins v. Portland, etc., R. R.*, 47 Me., 573; *Rutland & B. R. R. Co. v. Procter*, 29 Vt. 93; *Attleborough N. Bank v. Rogers*, 125 Mass. 339; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Oil Creek, etc., R. R. Co. v. Penn. Trans. Co.*, 83 Pa. St. 160; *Bank v. Hammond*, 1 Rich. L. 281; *Hozlehu:st v. Savannah, etc., R. R. Co.*, 43 Ga. 13; *So. L. Ins. Co. v. Lanier*, 5 Fed. 110; *Underwood v. Newport Lyceum*, 5 B. Mon. 129; *Hayes v. Galoin Gas & Co.*, 29 Ohio St. 330; *State Board of Agriculture v. Citizen Street R. R.*, 47 Ind. 407; *Germantown Ins. Co. v. Dhein*, 43 Wis. 420; *Thompson v. Lambert*, 44 Iowa. 239; *National Bank v. Ins. Co.*, 41 Ohio St. 1; *Union Water Co. v. Murphy's Flat*, 22 Cal. 721; *Hall Manuf. Co. v. American R. R. Co.*, 48 Mich. 331.

The contract is not void as against public policy. *Johnson v. Van Epps*, 110 Ill. 551; *Johnson v. Van Epps*, 14 Ill. App. 201; *Langdon v. U. M. L. Co.*, 14 Ill. App. 272; *The Provident L. Co. v. Baum*, 29 Ind. 236; *Campbell v. N. E. M. Co.*, 98 Mass. 381; *Ætna L. M. Co. v. Francis*, 94 U. S. 561; *Conn. M. L. Ins. Co. v. Shafer*, 94 U. S. 457; *Olinstead v. Keys*, 85 N. Y. 597; *Forbes v. American M. L. Ins. Co.*, 15 Gray, 249; *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294; *Rawls v. American M. L. Ins. Co.*, 27 N. Y. 283; *Fairchild v. N. E. M. L. Ins. Ass'n*, 51 Vt. 613; *Brockway v. M. B. Ins. Co.*, 9 Fed. R. 249; *Warnock v. Davis*, 104 U. S. 775; *Clark v. Allen*, 11 R. I. 439.

CONGER J. The facts disclosed by this record are, that one William R. Bailey, desirous of effecting an insurance upon his

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own life in the sum of \$5,000, for the use and benefit of appellee, Blue, made application to appellant for that purpose, and a life benefit certificate was, in October, 1883, issued to said Bailey, by which it was provided that such sum of \$5,000 should be paid to Blue within sixty days after the death of said Bailey. Bailey died, and suit was brought by appellee, Blue, upon the certificate, whereupon appellant filed four special pleas. In the first of said pleas it is averred that defendant is a corporation organized and doing business under an Act of the Legislature, approved June 18, 1883, in force July 1, 1883; that the plaintiff, Blue, is not a legatee or devisee of the said William R. Bailey, and is not related to said Bailey either by affinity or consanguinity, etc.; that the defendant, by virtue of the act under which it was organized and doing business, was only authorized to furnish life indemnity and pecuniary benefits to the widows, orphans, etc., of deceased members, by means whereof said life benefit certificate was and now is null and void.

The pleas all admit that the sum of \$88.75 is due plaintiff as the amount of membership fee and special assessments paid defendant by Bailey and Blue, which sum defendant offered to pay to plaintiff with interest, but that such tender was refused. The second plea is like the first, except that it contains additional averments. It is averred that the object for which the defendant corporation was organized, as appears from its articles of incorporation, is as follows: "The object for which it is formed is to provide and equitably distribute at minimum cost, a fund devoted to the relief of widows, orphan heirs and devisees of deceased members." It is also averred in this plea that Blue was not a creditor of Bailey and had no pecuniary interest in his life, and had no well founded expectation of pecuniary advantage to be derived from the continuance of the life of Bailey. This plea also contains a copy of the constitution and by-laws of defendant.

In the third plea the statute and the defendant's articles of incorporation are set up as a defense, and in the fourth plea the articles of incorporation and the fact that Blue had no pecuniary interest in the continuance of the life of Bailey, are the defense interposed.

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To these pleas plaintiff filed a general demurrer, but before the court passed upon the same the common counts were withdrawn from plaintiff's declaration. This left the two special counts, to which defendant had pleaded as above stated. The court then sustained the demurrer to the pleas and rendered judgment for the plaintiff, to which judgment and ruling of the court defendant, by its attorneys, excepted, and, standing by its pleas, brings the case to this court on appeal and asks a reversal of the judgment of the court below for the error committed in sustaining the demurrer to said pleas. The first section of the Act of June 18, 1883, under which the appellant corporation organized and is doing business, is as follows:

"Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That corporations, associations or societies, for the purpose of furnishing life indemnity, or pecuniary benefits to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees or legatees of deceased members, or accident or permanent disability, indemnity to members thereof, and where members shall receive no money profit, and where funds for the payment of such benefits, shall be secured, in whole or in part, by assessment upon the surviving members, may be organized, subject to the conditions hereinafter provided."

It is contended by appellant there can be no recovery in this case for two reasons: First, that the contract of insurance was against public policy; and secondly, that appellee does not come within the class of persons for whose benefit insurance may be effected, as provided by the Act of June 18, 1883; and that, therefore, the contract of insurance was beyond the power of the company to make, and was void.

Upon the first question, we do not think the contract void as against public policy, but we are satisfied with the conclusions reached by Mr. Justice Pillsbury in *Johnson et al. v. Van Epps*, 14 Ill. App. 201, 215, and adopt the following language from the opinion in that case, as expressing our views upon this point: "It would seem from the above authorities that where a person takes out an insurance upon his own life, for the benefit of some third person, who may not have an insurable

interest in the life insured, the question whether it is a gambling or wagering policy is in every case one for the jury to determine under proper instructions, and if it be found that the insured has been the principal actor in the transaction, and has entered into it with an honest purpose to aid one whom he deems a proper object of his bounty, the transaction will be sustained and the beneficiary be entitled to the money; but, on the other hand, if it appear that the party insured is but a mere nominal party, and he procured the insurance for the purpose of giving the beneficiary the advantage of such insurance upon his life, when the beneficiary could not obtain it in his own name, the transaction will be condemned, and the policy declared void." The pleas seeking to raise this question as a defense, do not allege any facts upon which an issue could be formed as to whether Bailey entered into the contract with an honest purpose to aid one whom he deemed a proper object of his bounty, but rely upon the one ground, that appellee "was not a creditor of Bailey, had no pecuniary interest in his life and had no well grounded expectation of pecuniary advantage to be derived from the continuance of the life of Bailey."

They were, therefore, defective, and the demurrer to them was properly sustained.

The second objection, that the contract is *ultra vires*, is attended with much greater difficulties. It is urged by appellee in reply to this objection, that if the contract were conceded to be beyond the power of the company to execute by a strict construction of the act under which it is acting, still it may be considered as the settled law of this State, that a corporation can not plead *ultra vires* to its own contracts, and refer to the cases in the Supreme Court where, under certain circumstances, the doctrine has been so held. In view of the great difficulty of the question and considering the importance of an early and final adjudication of it, we shall affirm the judgment of the court below, so that the parties, if they desire, may proceed without delay to have the question settled by the Supreme Court.

Judgment affirmed.

Harrison v. Ely.

PEACHY Q. HARRISON

V.

SARAH M. ELY.

Trespass for Assault and Battery—Damages—Whether Excessive—Instructions.

In an action of trespass for assault and battery this court finds no error in the instructions, and declines to interfere with a verdict for \$1,000 as excessive, the question involved, in view of the conflict of evidence, being for the jury.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. McGUIRE & COLBY and BRADLEY & BRADLEY, for appellant.

Messrs. PATTON & HAMILTON, for appellee.

WALL, J. This was an action of trespass for assault and battery. The jury found the defendant guilty and assessed the damages of the plaintiff at \$1,000.

A motion for a new trial was interposed, which was overruled by the Circuit Court, and judgment was entered for the plaintiff upon the verdict. The evidence leaves no doubt that the appellant committed an assault and battery upon the appellee, but how far he may have been provoked by the manner and language of the appellee, and how seriously she was injured, were the important questions of fact to be determined by the jury.

If the version given by the appellee was the true one, and if she has suffered as she says, the verdict is by no means unreasonable. We do not understand counsel to insist that appellant was free from blame, but that the damages allowed are excessive; and we assent to this if the version given by appellant is the true one, and if, as he seems to believe, there was no real injury sustained by the appellee, and that the in-

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jury complained of is either imaginary, due to hysterics or simulated.

Of these matters the court and jury below were so much better able to judge by seeing and hearing the respective parties and witnesses than we are, that it would be manifestly improper to interfere with the judgment for this cause. It must be assumed that the court below duly considered its responsibility in refusing the motion for a new trial and would not have sustained the verdict if the evidence, when considered in the light of the personal demeanor and appearance of the witnesses, did not warrant it.

The oft repeated and familiar considerations generally applicable, are especially so in this case. It may be that the jury and the court were both mistaken, but, if so, the mistake went only to the amount which the appellant was liable for. We are not justified in holding there was error in this respect.

The first, second and third instructions for plaintiff are subjected to some criticism by counsel, upon the ground that they are too indefinite. As to the first, it is said that while an assault may be wrongful and in an angry manner, it may be unintentional and without anger toward the person injured. It is clear that, as applied to the case in hand, the instruction is not objectionable in this respect. The appellee was, no doubt, the intended object of an angry assault, though, as suggested heretofore, her own conduct, while not justifiable, may have mitigated the offense. It is said, further, the instruction is too general in saying the plaintiff might recover for the damages sustained in consequence of the assault, but we see no objection to it on this account. Objections not more forcible as to the second and third, need not be stated. As to the fourth and fifth, it is urged they are faulty in advising the jury that plaintiff was entitled to punitive damages; citing *W., St. L. & P. Ry. v. Rector*, 104 Ill. 296.

They do not so read. They inform the jury that such damages may be given, but there is no intimation that, in any view of the case, plaintiff may claim it as a matter of right.

Finding no error in the record, we are constrained to affirm the judgment.

Judgment affirmed.

Comer v. Comer.

ALICE A. COMER, ADMINISTRATRIX, ET AL.,
V.
SATER C. COMER ET AL.

Trusts—Declaration of Trust in Government Bonds—Agreement—Evidence—Execution of Instrument—Proof of—Witnesses—Sec. 2, Chap. 51, R. S.

Upon a bill filed by heirs of the owner of certain Government bonds, to recover an interest therein, it is *held*: That by a written direction to the bank where the bonds were on deposit for safe keeping, the deceased placed the bonds in trust, first, for himself, during life, next, to his wife, to have the interest during life, and then the principal to revert to his heirs; that by an agreement between the widow and one of the heirs, the former recognized the trust created by her husband; that proof of the execution of the original instrument was unnecessary, the execution of the other, to which the first was attached as an exhibit, being proved; and that the custodian of an agreement between two of the heirs was not their agent in any such sense as would make the survivor a competent witness to facts testified to by him, within the meaning of the second exception to Sec. 2, Chap. 51, R. S.

[Opinion filed August 26, 1887.]

APPEAL from the Circuit Court of Hancock County; the Hon. WILLIAM MARSH, Judge, presiding.

On the 10th day of March, 1884, appellants filed their bill in the Circuit Court, therein alleging that on the 28th of December, 1866, Samuel Comer, since that time deceased, had on deposit for safe keeping in the hands of George C. Anderson & Co., bankers, of Keokuk, 7-30 United States bonds to the amount and value of \$6,000. That on said 28th day of December, 1866, said Samuel Comer executed and delivered to said George C. Anderson & Co. an instrument in writing of that date, as follows, to wit:

“HAMILTON, December 28, 1866.

“GEORGE C. ANDERSON & Co.,

“*Gents*:—Of the seven-thirty Government bonds of mine in your hands, I hereby assign to my wife, Harriet Comer,

\$6,000, she to draw the interest of the same, you keeping possession of the same, and when matured to convert into five-twenty Government bonds, first series, to remain in your hands, my wife to draw the interest until her death; have no control of the principal, so far as disposing of them is concerned; the bonds at my death to revert to my heirs. The above assignment to take effect at my death, I controlling them in the meantime.

“(Signed.)

SAMUEL COMER.

“Will you be kind enough to file this with my bonds.”

That said declaration of trust made by Samuel Comer, and said bonds remained in the hands of George C. Anderson & Co. until July, 1867, when Samuel Comer died in Hancock County, Illinois, intestate, leaving personal and real estate of the value of \$25,000, but leaving no debts. That said declaration of trust remained in full force and said bonds were a trust fund in the hands of said George C. Anderson & Co. and their successors in trust, to hold the same and pay the interest accruing thereon to said Harriet Comer during her natural life, and at her death should become the property of the heirs of Samuel Comer.

That Samuel Comer left surviving him said Harriet Comer, his widow, and two sons, Sylvester L. Comer and the defendant, Sater C. Comer, his only heirs at law. That no administration of the estate of Samuel Comer was ever granted to any one.

That said bonds remained in the hands of said George C. Anderson until the firm was dissolved by the death of Anderson and then came into the possession of Boner, Barclay & Co., successors of said George C. Anderson & Co., and continued in the possession of Boner, Barclay & Co. until the 29th day of June, 1871, when the said Sylvester L. Comer and Harriet Comer executed an instrument in writing, in the words and figures following, to wit:

“Whereas, Samuel Comer, deceased, before his death, deposited with George C. Anderson & Co. \$6,000 in Government bonds under the trust and condition specified in the paper, a copy of which is hereto attached, for the benefit of Harriet

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Comer, his wife, during her life, with remainder of the principal to the heirs of said Samuel Comer. Now, for the purpose of other and better investment and for a valuable consideration to each of us moving, it is agreed by the said Harriet Comer and by Sylvester L. Comer and Sater C. Comer, the only heirs of said Samuel Comer, that the said George C. Anderson & Co. and their successors and all members of said firm are hereby released from said trust, and the said Boner, Barclay & Co., with whom said bonds are on deposit, are authorized and empowered to deliver and pay over to the said Harriet Comer the said \$6,000 of bonds.

“Witness our hands this June 29th, 1871.

“HARRIET COMER.

“S. L. COMER.

“(Witness) R. C. PARROTT.”

That a copy of said declaration of trust made by Samuel Comer was attached by Sylvester L. and Harriet Comer to said instrument, signed by them as set forth above.

That on said 29th of June, 1871, said Sylvester L. Comer and Harriet Comer took said bonds to the amount of \$6,000, or other Government bonds into which they had been converted of that amount, from the hands of Boner, Barclay & Co., and deposited them for safe keeping in the Hancock County National Bank, of Carthage, Illinois.

That after said bonds were left in said Hancock County National Bank, one of them of \$1,000, was sold by said Harriet Comer, and the proceeds thereof being \$1,000, was loaned by her on note and mortgage. And the remaining \$5,000 of said bonds was also converted and the proceeds thereof invested in United States four per cent. bonds, payable at the pleasure of the Government, after July 1, 1907. That said note and mortgage and \$5,000 of United States bonds, being the present form of said trust fund, are yet on special deposit in said bank, defendant herein.

That Sylvester L. Comer died March 3, 1879, in Hancock County, Illinois, intestate, leaving the complainants, Alice A. Comer, his widow, and Harriet L. Hazen, Samuel H. Comer, and Frank G. Comer, his only children and heirs. That said

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Alice A. Comer is administratrix of the estate of said Sylvester L. Comer, and lawful guardian of said Samuel H. and Frank G. Comer.

That Harriet Comer, widow of Samuel Comer, died April 25, 1883, leaving a will, by which Sater C. Comer is made sole legatee of all her estate, and executor of the will. That said will was proved and letters testamentary issued to said Sater.

Complainants claim that upon the death of said Samuel Comer, one-half of said bonds was vested in said Sylvester L. Comer, subject to the right of said Harriet Comer, widow of Samuel Comer, to take and enjoy the interest accruing thereon during her natural life, and that upon the death of said Harriet Comer, said half of said trust fund in its present form became the property of, and part of the estate of said Sylvester L. Comer, and as such subject to distribution to complainants as his widow and heirs. That all debts due from the estate of said Sylvester L. Comer have been fully paid.

The bill prays that half of said trust fund may be delivered to Alice A. Comer, as administratrix of the estate of said Sylvester L. Comer, or to his said widow and heirs according to their respective rights.

Exhibit A, will of Harriet Comer. Answer of Sater C. Comer, as an individual and as executor of the will of Harriet Comer, filed on the 29th day of April, 1884.

The answer admits that Samuel Comer died intestate as stated in the bill and left him surviving Harriet Comer, his widow, and Sylvester L. Comer, and respondent, Sater C. Comer, his children and only heirs at law. Denies that Samuel Comer had any interest in the bonds in the bill mentioned, at the time of his death. Denies that any interest in said bonds descended to Sylvester L. Comer. Admits that Sylvester L. Comer died as stated in the bill and left him surviving complainants, his widow and only children and heirs at law, and that administration was granted on his estate as stated in the bill. Denies that complainants have any interest in said bonds or proceeds thereof. Avers that said bonds and proceeds were the property of Harriet Comer, and that respondent now owns the same as legatee under her will. The

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answer of the Hancock County National Bank, Carthage, filed April 30, 1884. That Harriet Comer deposited bonds to the amount of \$7,000 in said bank of the 29th of June, 1871. Admits that said bonds to the amount of \$5,000 and the note and mortgage of \$1,000, are held by said bank. Has no knowledge as to who owns said bonds, note and mortgage.

General replication to answers filed May 2, 1884. Decree of court dismissing bill, and that defendants recover costs, rendered on the 24th day of October, 1885, at October term.

Messrs. MACK, BAIRD & MACK, for appellants.

Messrs. MANIER & MILLER and HOOKER & EDMONDS, for appellees.

CONGER, J. Before considering the legal effect of Samuel Comer's letter to Geo. C. Anderson & Co., of date December 28, 1866, and the instrument signed by Harriet and Sylvester L. Comer, of date June 29, 1871, we will notice the objection that is made, that there is no proof in the record of the original execution of the one of date December 28, 1866.

The second instrument, bearing date June 29, 1871, is proven by the testimony of Lewis C. Stevenson, he stating positively that the signature thereto is the genuine signature of Harriet Comer, and the instrument is made an exhibit to his deposition, to which instrument is attached what purports to be, and what is clearly declared to be by said instrument, a copy of the letter of December 28, 1866.

We are of opinion that this copy attached to and clearly referred to in the instrument, signed by Harriet Comer, as to her and all claiming under her, was conclusive evidence of the original existence of Samuel Comer's letter, of December 28, 1866, and superseded the necessity of introducing any other evidence to establish it. *Carver v. Jackson*, 4 Pet. 83; *Greenleaf on Evi.*, Vol. 1, Sec. 97.

The instrument executed by Samuel Comer was as follows:

"HAMILTON, December 28, 1866.

"GEORGE C. ANDERSON & Co.

"*Gents*:—Of the seven-thirty government bonds of mine in your hands, I hereby assign to my wife, Harriet Comer, six

thousand dollars, she to draw the interest of the same, you keeping possession of the same, and when matured to convert into five-twenty government bonds, first series, to remain in your hands, my wife to draw the interest until her death; have no control of the principal so far as disposing of them is concerned; the bonds at my death to revert to my heirs.

“The above assignment to take effect at my death, I controlling them in the meantime.

“(Signed)

SAMUEL COMER.

“Will you be kind enough to file this with my bonds?”

The only difficulty in determining the meaning and effect of this instrument, exists in the clause: “The above assignment to take effect at my death, I controlling them in the meantime.”

While the whole instrument, including the foregoing clause, is not entirely clear, we are inclined to construe it to mean that Comer intended to declare the bonds in trust, first to himself to have the interest thereon during his life, next to his wife, if she survived him, she to have the interest during her life, and then the principal to revert to his heirs. That he meant by the words, “the above assignment to take effect at my death, I controlling them in the meantime,” to vest the legal title to the bonds in George C. Anderson & Co. as trustee, for himself, his wife, and heirs, immediately, yet his wife and heirs were to take no benefit therefor, nor exercise any control over the fund or its interest, until his death. But whatever of doubt there may be as to the true meaning of this instrument, there can be none as to that of date June 29, 1871, executed by Harriet Comer and Sylvester L. Comer, which is as follows:

“Whereas, Samuel Comer, deceased, before his death deposited with George C. Anderson & Co. \$6,000 in government bonds under the trust and conditions specified in the paper, a copy of which is hereto attached, for the benefit of Harriet Comer, his wife, during her life, with remainder of the principal to the heirs of said Samuel Comer. Now, for the purpose of other and better investment and for a valuable consideration to each of us moving, it is agreed by the said Harriet Comer and by Sylvester L. Comer and Sater C. Comer, the only heirs of said Samuel Comer, that the said George C. Anderson & Co., and their successors, and all members of said firm,

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are hereby released from said trust, and the said Boner, Barclay & Co., with whom said bonds are on deposit, are authorized and empowered to deliver and pay over to the said Harriet Comer the said \$6,000 of bonds.

“Witness our hands, this June 29, 1871.

“HARRIET COMER,

“S. L. COMER.

“(Witness) R. C. PARROTT.”

To which was attached a copy of the original letter of Samuel Comer. Here was a clear recognition by Harriet Comer, of the trust created by her husband, and was binding upon her; and as Sater Comer claims the one moiety of the principal of the fund by virtue of Harriet Comer's will, he can have no greater interest in it than she had at her death.

We are therefore of opinion that upon the death of Harriet Comer the principal of said fund vested, the one-half in Sater Comer, and the other half in the widow and heirs of Sylvester L. Comer, deceased.

It is insisted because an instrument in writing was left in the hands of Mr. Ruggless, by the two brothers, as the custodian thereof, that he thereby became their agent, and when called as a witness as to certain statements of Sater, that thereby Sater became a competent witness to the same conversation and transaction by virtue of the second exception to the second section of chapter 51. We do not concur in this conclusion. Ruggless was not the agent of either party in any such sense as contemplated by the statute, and it was therefore error to permit Sater to testify.

While there is some conflict in the statements proven of Harriet Comer, we are satisfied, after considering them all, that she understood that she had but a life interest in this fund, but whether she so understood or not, would make no difference, as the rights of all parties were fixed by the original declaration of trust, and her deliberate recognition of its terms by her instrument of June 29, 1871.

The decree of the Circuit Court will therefore be reversed and the cause remanded, with directions to the Circuit Court to enter a decree in accordance with the prayer of the bill.

Reversed and remanded with directions.

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JOHN J. BONNET ET AL., PARTNERS,
V.
HENRY O. GLADFELT.

Contractors—Action for Labor and Material—Conflict of Evidence—Question for Jury—Instructions—Trial—Witnesses—Discretion—Misconduct of Juror.

1. Where the questions involved are mainly of fact and the evidence is conflicting, this court will not interfere unless some substantial error has intervened.

2. In an action of assumpsit for labor and materials by a contractor who had been displaced by the defendants before the completion of their building, it is *held*: That there was no error in allowing the plaintiff to refer to a memorandum of items and charges taken from his books; that the court properly refused to allow the cross-examination of a certain witness to extend to a matter not covered by the examination in chief; that an objection calling for an expression of opinion by another witness was properly sustained; that there was no abuse of discretion by the court in refusing the application to recall a witness, after a day or more, to make an additional statement in regard to a matter about which he was interrogated but could give no definite reply when first examined; that there was no error in giving and refusing instructions; and that the charge of misconduct of a juror is not sustained.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. JOHN H. WILLIAMS, Judge, presiding.

Messrs. ALMERON WHEAT and WILLIAM W. BERRY, for appellants.

Messrs. CARTER & GOVERT, for appellee.

WALL, J. This was an action of assumpsit by the appellee against the appellants for labor and materials furnished in the rebuilding of a certain foundry which had been partially destroyed by fire. The defendants filed pleas of non-assumpsit and set-off on which there was issue. The case was tried by

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jury resulting in a verdict for the plaintiff for \$511.95, and the court after refusing to grant a new trial rendered judgment accordingly.

It appears, from the evidence, that a written contract was entered into by which the appellee was to do the work according to certain specifications for \$1,050 by the 10th of March, 1883, and that the architect, Tubbesing, should have power to supervise the work and accept or reject the same, and that his decision should be binding on both parties. The work progressed nearly to completion, and payments, amounting to some \$500, had been made upon the certificates of the architect when the appellants took charge of the building, employed another man to finish it and appropriated the materials of the appellee, consisting of brick, mortar, etc., to his own use.

It was insisted by appellee that this action on the part of appellants was wholly without excuse, that he was ready and willing to carry out his contract, and, therefore, as he was prevented from so doing by appellants without fault on his part, he is entitled to recover the reasonable value of his labor and materials, including the value of the materials left by him and by appellants used in completing the work.

On the other hand the appellants insisted that he did not properly do the work and that the architect so informed him and refused to accept it, and that, after waiting a sufficient time for him to make such changes and amendments as were required by the architect, they did, as they lawfully might on that state of facts, resume possession and control of the property and cause the work to be finished, and that in so doing it became necessary to tear down and rebuild a part of the work done by him and by reason thereof and of the failure to have the work done by the time fixed in the contract they sustained damages larger in amount than the claim of the plaintiff.

The testimony was conflicting and voluminous and it was a fair question for the jury to determine whether the plaintiff had substantially complied with the contract and had been improperly prevented from completing it.

There was abundant proof to justify the plaintiff's view of

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the case considering only that introduced by him while that of defendants considered alone would, as certainly, support their view. It follows that, unless the court committed some substantial error calculated to prejudice the appellants, we can not interfere.

It is urged that the court erred in not permitting the defendants to ask the witness Gentemann, on cross-examination, "whether all the defective parts of the west wall were taken down before he commenced to rebuild." This was not, strictly speaking, cross-examination, as the witness had not been examined on this point in chief; nor does it appear that he was possessed of the information necessary to answer the question, as he worked there only four or five days, and that after the first story was up. We can not say that there was error in this ruling.

Complaint is made that the plaintiff was permitted to refer to a memorandum, drawn from his books, to refresh his memory in regard to the amount due him for work and materials furnished. This memorandum consisted merely of the items and charges for each, for which he sought to recover. There was no error in allowing such reference. 1 Gr. Ev., Sec. 436; C. & A. R. R. Co. v. Adler, 56 Ill. 344.

The court refused to permit the witness Steinbach to be recalled to make an additional statement in regard to a matter about which he was interrogated, but could give no definite reply when he was first upon the stand, and of this ruling complaint is made. It was within the sound discretion of the court to allow or refuse the application and as some time, a day or more, had elapsed, it does not appear that there was any abuse of discretion.

It is also objected that the court sustained an objection to a question put to the witness Heidbreder. The question called for an expression of opinion as to what would be necessary, in order to rebuild the wall in a good and workmanlike manner. The witness had already stated the facts within his knowledge, as to the appearance and condition of the wall. He had stated that he had followed the business of brick-laying for twenty-five years. Whether his experience was such

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as to enable him to pass an opinion upon the point involved he did not state, and there is nothing from which it could necessarily be inferred that he was competent to give the desired opinion. On turning to the record and reading the evidence of this witness, we are satisfied that he had, substantially, answered this question, and that there is but little, if any ground of complaint in this regard, even if it were conceded that he had shown himself an expert and competent as such to answer the question referred to.

There was no such error here as to justify a reversal of the judgment.

The action of the court in giving and refusing instructions is next urged upon our attention. We have carefully considered this point in the light of the somewhat elaborate arguments of counsel, and deem it necessary to say merely, that in our opinion the jury were fairly and fully instructed upon the issues to be tried. We find no improper instructions given for plaintiff, and we find no proper instructions asked by defendants refused or not sufficiently embodied in others which were given. The eighth was properly refused, because based upon an unsound construction of the contract.

It is urged finally, that the court erred in not setting aside the verdict because of improper conduct of one of the jurors in riding home from the court house one evening in the wagon of and along with the plaintiff. After a careful reading of the affidavits and counter-affidavits submitted upon this point we are satisfied that the court properly disposed of it. There was no reason to believe that the juror was influenced in his verdict by what occurred as disclosed by the affidavits. The whole case considered, it must be apparent that the controversy involves, mainly, questions of fact which were fully tried before the jury and upon which they have rendered their verdict. It does not appear that any substantial error has intervened or that another trial would bring a different result, nor can we see that any injustice has been done. The judgment is affirmed.

Judgment affirmed.

Root v. Sinnock.

HENRY ROOT
V.
THOMAS SINNOCK.

Banks—Charter of Union Bank of Quincy—Individual Liability of Stockholders—Construction—Proviso—Constitution of 1848.

1. Under the charter of the Union Bank of Quincy its stockholders are individually liable to the amount of their stock for all debts of the corporation.

2. In the construction of a statute, effect will be given, if possible, to every word and sentence contained therein.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

The declaration filed in this cause contains two counts. In the first it is alleged in substance: That on the 26th day of March, 1869, by a certain public law of the State of Illinois, the Union Bank of Quincy was incorporated and from the 1st day of June, 1883, to the 15th day of May, 1884, was engaged in a general banking business at the City of Quincy; that during this time it had a savings department connected with it and constituting a part of its business, in which deposits of money were received from various persons; that on the 1st day of September, 1884, the bank was indebted to appellee in the sum of \$7,200, for so much money deposited with it in its savings department at different times between the 1st day of June, 1883, and the 1st day of February, 1884, and in the further sum of \$500 as interest on such deposits; that on the 1st day of June, 1883, and at the time of bringing suit, appellant was the owner of 100 shares of the capital stock of said bank, of the par value of \$100 per share; that on the 15th day of May, 1884, the bank closed its doors and never resumed business as a bank, but that it did, on the 16th day of September, 1884, make an assignment to John P. Mickesell for the

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benefit of creditors; and that by means thereof and by force of the act incorporating the bank, appellant became liable to pay appellee the sum due the latter from the bank.

The second count avers that at the time the bank closed its doors and at the time of bringing suit appellant was the owner of 100 shares of stock, but it is in other respects similar to the first count.

To each count of the declaration a general demurrer was filed and was overruled by the court, and, the defendant standing by his demurrer, evidence was heard by the court and judgment was rendered against appellant in the sum of \$5,910, and costs of suit. From this judgment an appeal was prayed and it is alleged that the court erred in not sustaining the demurrer to each count of the declaration and in entering final judgment in favor of appellee for \$5,910.

Messrs. SIBLEY & PAPE and ALMERON WHEAT, for appellant.

Appellee's right to recover depends upon whether any liability for the debts of the corporation was imposed upon the stockholder, by the last proviso in Sec. 7 of the act incorporating the bank, beyond the actual payment either to the corporation or creditor, for the stock subscribed for by him, at its par value.

A proviso must be strictly construed. Potter's Dwarries on Statutes, pages 118 to 120; Kent's Commentaries, Vol. 1, p. 463; Voorhees v. Bank of the U. S., 11 Pet. 471; Minis v. U. S., 15 Pet. 445; Brown v. Juliet, 1 Scam. 258.

If the matter of the proviso be regarded as an independent provision, it would be one in derogation of the common law, and must still be strictly construed. The rule is that no statute is to be construed as altering the common law, further than is expressed or its words import. Shaw v. Railroad Co., 101 U. S. 565; Carney v. Tully, 74 Ill. 375; Thompson v. Weller, 85 Ill. 197; Bromley v. Goodwin, 95 Ill. 118-123; Canadian Bank v. McCrea, 106 Ill. 281, 289.

If the matter of the proviso was inserted because of any constitutional provision that would throw no light upon the question as to the extent of the liability of the stockholders. The

bank not having any power to issue notes to circulate as money, Sec. 2 of Art. 10 of the Constitution of 1848, is the only constitutional provision imposing any duty on the Legislature in the matter. *The People v. Loewenthal*, 93 Ill. 191, 196; *Gulliver v. Roelle*, 100 Ill. 141, 147.

Mr. WILLIAM McFADDEN, for appellee.

The language of the charter is substantially the same as is contained in the Constitution of 1848, relating to banking corporations issuing bank notes.

It could not be contended that the words "to the amount of their respective share or shares of stock," in the clause of the Constitution of 1848 cited, meant that the stockholder should be liable only for the amount of stock actually subscribed and remaining unpaid by him at the time of suit brought. Properly construed, that clause in the Constitution created a double liability on the part of the stockholder. *Morse on Banking*, p. 493; *In re Empire City Bank*, 18 N. Y., 218; *Matter of the Hollister Bank*, 27 N. Y., 395.

We think that *People v. Loewenthal*, 93 Ill. 191, 196, recognizes the same doctrine in the distinction which the opinion draws between the 2d and 4th sections of Article 10th of Constitution of 1848.

But irrespective of the constitutional provision aforesaid, the proper construction of the 7th section of the charter of "The Union Bank of Quincy" makes each stockholder therein liable for the debts of said bank in an amount equal to the amount of stock held by him—in other words, said section creates a double liability. *Morse on Banking*, p. 493; *Briggs v. Penniman*, 8 Cowan, 395; *In re Empire Bank*, 18 N. Y., 218; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 493; *In re Hollister Bank*, 27 N. Y. 396; *Slee v. Bloom*, 19 Johns. 456; *S. C.*, 20 Johns. 633; *Bromley v. Goodwin*, 95 Ill. 118; *Wincock v. Turpin*, 96 Ill. 135; *Lane's Appeal*, 105 Pa. St. 57.

The language of this charter is to be construed as meaning a liability on the part of the stockholder to a creditor in an amount equal to the amount of his stock. *Thompson v. Meisser*, 108 Ill. 359. Clauses inserted in bank and other

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charters of the kind under consideration, are inserted for the benefit of creditors, and that they give a right of action to the creditor and no one else against the stockholder. *Culver v. 3d Nat. Bank*, 64 Ill. 528; *Fuller v. Ledden*, 87 Ill. 310; *McCarthy v. Lavasche*, 89 Ill. 276; *Hull v. Burtis*, 90 Ill. 213; *Jacobson v. Allen*, 20 Blatch. 525; *Norris v. Johnson*, 34 Md. 485.

WALL, J. The question presented here is as to the individual liability of a stockholder in the Union Bank of Quincy, under a charter granted by the General Assembly. Vol. 1, P. L. 1869, 219-221.

The corporation thus created, while not possessing "banking powers" within the meaning of that term, as used in Sec. 4, Art. 10 of the Constitution, and as construed in *The People v. Loewenthal*, 93 Ill. 191, was authorized to borrow and loan money, and to buy and sell bills, notes, bonds and other securities, and to carry on a general exchange business. The capital stock was fixed at \$500,000, to be divided into shares at \$100 each, and authority was given to commence business as soon as \$150,000 should have been subscribed and twenty per cent. paid thereon. Sec. 4 provided that the payment for stock should be made in such time and way as the directors should prescribe. Various provisions relating to the manner and conditions of subscription, etc., are found in the act, which are not important in this connection. The charter is declared to be a public act and as such to be liberally construed. Sec. 7 is as follows:

SEC. 7. "It shall be lawful for the corporation hereby created to purchase and hold such real estate as may be convenient and useful in the transaction of its business and to take and hold any real estate in trust or otherwise as security for or in payment of loans and debts due or to become due to said corporation, to bid for and purchase real estate at any sale made by virtue of or on account of any loan or mortgage or trust made to or held by or for said corporation, or in which it is interested, and to receive and take in satisfaction of any loan or debt, any real or personal estate and to hold,

use and improve, lease and convey the same: *Provided*, that no real estate, beyond such as may be necessary for the transaction of its business, shall be held by said corporation for a longer period than may be necessary to enable said corporation to dispose of same to advantage, and all real estate sold by said corporation under deed of trust or other conveyance, may be redeemed by the debtor, his, her or their heirs or creditors, by the payment of the full amount of debt and costs together with ten per cent. interest on same, at any time within twelve months after such sale: *Provided*, also, that the stockholders in this corporation shall be individually liable to the amount of their stock for all debts of the corporation and such liability shall continue for three months after the transfer of any stock on the books of the corporation."

The language of the last proviso is the subject of the present inquiry. Appellee insists that thereby the stockholder is made liable for an amount equal to and aside from his obligation to pay for the stock by him subscribed, an additional security being thus provided for the benefit of creditors.

On the other hand, the appellant urges that no such extra liability was intended, and that when the stock had been paid for at its par value, the liability of the stockholder is exhausted, and that, as there is no averment of non-payment according to the contract of subscription, no cause of action is disclosed by the declaration and, therefore, the court erred in overruling the demurrer. The view taken by appellant makes the clause under consideration practically meaningless and superfluous. The stockholder is liable without this provision for the whole amount of stock subscribed by him. This he must pay to the corporation and whatever he may owe in this respect is assets of the corporation, and as such may be reached and participated in by a corporation creditor, by the appropriate means.

The Constitution of 1848, Sec. 2, Art. 10, provided that dues from such corporations should be secured by such individual liabilities of the corporators, or other means, as might be provided by law, and we have no doubt the Legislature intended, in this instance, pursuant to the plain mandate and policy of the organic law, to impose another liability to which

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creditors may resort without waiting for the collection and distribution of the corporate assets. Such provisions were not inserted without purpose, and in aid of construction it is a rule to give some effect, if possible, to every word and sentence contained in the act.

It being enjoined by the Constitution, that corporate dues should be secured in some such way, and the language used being wholly unnecessary and superfluous, if not so designed, the very natural inference would be that such was the object. Provisions like this have been made the basis of recovery in numerous cases which are familiar, and some of which are cited in the briefs. Among others may be noticed *Arenz v. Weir*, 89 Ill. 25, where the provision was, "No stockholder of the corporation hereby created shall be liable in his individual capacity for any debt or liability of said company beyond the amount of stock held by him."

In reply to the criticism of counsel the court said the meaning was plain that every stockholder should be liable to the extent of the stock held by him for any debt or liability of the company, and that the Legislature was but carrying into effect the constitutional requirement above referred to.

Counsel contends the language here relied on is not susceptible of the construction put upon it and to give it such import there must be added the words "equal to" or some others indicating specially a liability aside from that for the payment of stock to the company. Such a position is narrow and untenable. The expression in *Arenz v. Weir*, *supra*, was held sufficient and that case is very much in point here. Similar language has been so held in other cases though it may be the precise expression has not been found elsewhere. It should be construed in the light of the object the Legislature had in view under the Constitution, and we have no difficulty in adopting the construction already stated. *Morse on Banking*, p. 493; *Briggs v. Penniman*, 8 Cow. 395; *Lane's Appeal*, 105 Pa. St. 57; *Bromley v. Goodwin*, 95 Ill. 118; *Wincock v. Turpin*, 96 Ill. 135; *Meisser v. Thompson*, 9 Ill. App. 368; *Thompson v. Meisser*, 108 Ill. 359.

It is urged by counsel that the expression here relied on is

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but a proviso, and that no case can be found where such liability has been predicated upon a mere proviso. We have quoted the section entire, so that all its provisions may be seen together, and when so read it would appear that this clause is not so much in the nature of a proviso, a qualification or modification of what precedes, as an independent provision which might well have constituted a separate section, but which, for convenience or some cause not important, was incorporated as it is in Sec. 7. We see no reason why we should nullify and disregard the language because of its position in the section.

The second count differs from the first in the material respect that it is not averred the stock was held by the defendant when the default occurred. The provision fixes "liability for all debts of the corporation," and declares that "such liability shall continue for three months after the transfer of stock on the books of the corporation." Under this it would not be necessary for one about to seek relief to ascertain who held stock when the money was deposited, but he might sue those who held stock and had not transferred it within three months of the time when default occurred.

When the money was deposited the inchoate liability would attach to the then stockholders, and to them for three months after transfer, and as the stock might be transferred the liability would be transferred also. Upon the point here involved, see generally, Thompson on Stockholders, Secs. 90, 94, 95, 210, 215, 217; McLaren v. Franciscus, 43 Mo. 452; Middleton v. Magill, 5 Conn. 28; *In re Empire Bank*, 18 N. Y. 223; Curtis v. Harbour, 12 Mich. 3.

We are of opinion the court properly overruled the demurrer to the declaration.

There is nothing perceived in the record to show the basis upon which the damages were assessed, and it must be presumed there was sufficient evidence to justify the assessment. The judgment will be affirmed.

Judgment affirmed.

Decatur Gaslight & Coke Co. v. City of Decatur.

DECATUR GASLIGHT AND COKE COMPANY

V.

THE CITY OF DECATUR.

Municipal Corporations—Contract with Gas Company—Construction of—Exclusive Privileges.

1. Under an ordinance providing that a gas company shall furnish the city with gas "of a quality at least equal to and at rates as favorable as that furnished" by a gas company in a neighboring city, the rates charged can not at any time exceed those then charged by the latter company.

2. In an action by a gas company to recover the contract price of gas furnished to a municipal corporation, the question whether the plaintiff is entitled to exclusive privileges, under an ordinance purporting to grant such privileges, does not arise.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Macon County; the Hon. C. B. SMITH, Judge, presiding.

Messrs. CREA & EWING, for appellant.

Mr. I. R. MILLS, City Attorney, for appellee.

WALL, J. This suit was brought by appellant to recover the value of gas furnished to the appellee.

The case was submitted to the court without a jury upon an agreed state of facts from which it appeared that the appellee, a corporation created by a special act of the Legislature in 1865 with perpetual existence, was, by an ordinance of the City of Decatur, passed in March, 1867, authorized to use the streets, alleys and other public grounds of the city for the purpose of laying down and maintaining therein pipes for the use of the city and inhabitants thereof. Section 3 of the ordinance is as follows:

"That, in consideration of the privilege herein granted, the said Decatur Gaslight and Coke Company, their assignee or assignees, shall furnish gas of a quality at least equal to, and

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at rates as favorable as that furnished by the Springfield Gaslight Company, in the City of Springfield, Illinois, and they are to have the exclusive right to lay down and maintain their own gas pipes in said streets, lanes, alleys or other public grounds from the taking effect of this ordinance, during and until the expiration of the charter of said company, as now established.”

The price charged by the Springfield company for gas when this ordinance was adopted, was \$3.25 per one thousand cubic feet.

The City of Decatur has been a consumer of gas furnished by the appellant company since the opening of the works in the year 1868. The rate first charged by the company and paid by the city was \$3.60 per thousand and was reduced at various times, the last reduction being to \$2, at which rate the city paid from November 1, 1883, to May 1, 1885. The controversy now before the court relates to the gas furnished from May 1, 1885, to September 1, 1885, for which the company charged \$2 per thousand, amounting to \$4,569.60.

The city tendered \$3,427.20, being at the rate of \$1.50 per thousand and the costs accrued, which tender, though refused by the company, was kept good.

During the period within which the gas in question was used by the City of Decatur, the price charged by the Springfield Gaslight Company was \$1.50 per thousand. It was contended by the City Council of Decatur, that the Decatur company, by the third section of the ordinance heretofore set out, was limited in its charges to \$1.50 per thousand, the price charged by the Springfield company. Hence the refusal to pay the \$2 per thousand. In the stipulation of facts is the following provision:

“It is agreed that in case the court shall find that the plaintiff is limited in its charges for gas to the price charged by the Springfield Gas Light Company since February, 1884, viz., \$1.50 per thousand cubic feet, then the judgment shall be for the plaintiff for the sum of \$3,427.20 and \$4.45 of the costs of suit; and that judgment shall be entered against the plaintiff for the balance of the costs of suit.”

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“If the court shall find that the plaintiff is not limited to the charges for gas made by the Springfield Gas Company since February, 1884, viz., \$1.50 per thousand, then the judgment shall be for the sum of \$4,569.60, and all costs of suit, in favor of the plaintiff and against the defendant.”

The court found the company was limited in its charges to the price charged by the Springfield company, \$1.50, and judgment was entered accordingly. The appellant company brings the record here, and by its assignment of errors questions the propriety of this finding and judgment.

Counsel for appellant insist that one of two constructions should be placed upon said Sec. 3: 1st. It imposed upon the appellant company a maximum price only, viz., the price charged by the Springfield company when the ordinance was passed, \$3.25; or, 2nd. The expression “at rates as favorable as that furnished by the Springfield company” does not mean that the same price should be charged by the appellant company as by the Springfield company but that the gas should be furnished by appellant at rates as favorable as gas should be furnished by the Springfield company under like circumstances and conditions. The language involved is not difficult or obscure and when it is considered, in the light of the then situation of the parties, we think its meaning reasonably clear. The object was to provide for the quality and price of gas during the whole period contemplated by the ordinance.

Had it been designed to permanently adopt the then quality and price prevailing at Springfield it would have been quite easy to say so in plain terms. Such was not the object. It was known that the price at which gas could be furnished would depend greatly upon the number of consumers, and this would depend mainly upon the growth of the city. The quality would, to some extent, affect the amount consumed, and the company would find it necessary to maintain as good a quality as that begun with and reasonably fit for use. It was, of course, assumed that the population would increase and therefore the natural and reasonable expectation would be that the price in Springfield would reduce, from time to time, the quality being maintained, if not improved. This was a practical and business-like view and was fair to all concerned.

Decatur Gaslight & Coke Co. v. City of Decatur.

The city could afford to take the risk of paying higher rates where it was scarcely doubtful that they would be lower, as certainly would be the case, if the prosperity and growth of Springfield were assured. The term "rates as favorable," can have but one meaning, that is, that no more should be charged in Decatur than in Springfield, with a possibility of even a lower rate, if justified by an increase of business and other circumstances not unlikely to occur.

The suggestion that the comparison of rates was to depend on the comparative volume of business and net profits in the two cities, is not tenable. This involves the adding of words not found in the section, and it involves the consideration of various circumstances which would be sure to cause doubt and controversy.

Careful and prudent men would not be disposed to put themselves in such a position, nor would they be apt to do so.

It is suggested that the ordinance was void because it gave the appellant company a perpetual and exclusive right to furnish gas and that the Council which passed the ordinance had no power in that way to bind its successors.

It is not necessary to determine whether the ordinance is invalid for this reason or not. The contract thereby created is valid so far as it has been executed—so far as it is executory it may, perhaps, not be enforceable. For the gas which the city has consumed it is bound to pay according to the contract, and the company is bound to accept payment according to the contract.

The gas was furnished and received under the contract, and to that extent both parties are bound by the contract. *E. St. Louis v. E. St. L. G. & C. Co.*, 98 Ill. 415.

We are of opinion the judgment of the Circuit Court is based upon a proper view of the rights of the parties and it will be affirmed.

Judgment affirmed.

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DANIEL H. CASWELL

V.

ANNA M. CASWELL.

Fraudulent Divorce—Bill of Review—Laches—Delay of Fourteen Years—Sec. 19, Chap. 22, R. S.—Domicile of Wife—Removal of Causes—Additional Abstract—Costs.

1. Where the proof of fraud is clear and cogent, and convincing reasons are given for the delay, mere lapse of time does not bar a bill of review to impeach a former decree for fraud.

2. A decree may be attacked for fraud in its procurement after the three years, limited in Sec. 19, Chap. 22, R. S., and after the five years allowed for suing out a writ of error, if sufficient reasons are given for the delay.

3. A decree of divorce procured through fraud, by one who has since remarried and has had children by such subsequent marriage, may be set aside upon a bill of review filed after a delay of fourteen years, if clear and convincing reasons appear for the delay.

4. A bill of review filed in the Circuit Court to annul a former decree, granting a divorce by that court for fraud, is not removable to the Circuit Court of the United States, although the defendant resides in another State.

5. Where it is necessary for the appellee to file an additional abstract in this court and the decree is affirmed, the costs thereof will be taxed against the appellant.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Piatt County; the Hon. C. B. SMITH, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

The defendant's plea, setting up Sec. 19, Chap. 22, R. S., as a bar to this suit, should have been sustained. *Lawrence v. Lawrence*, 73 Ill. 577; *Lyon v. Robbins*, 46 Ill. 276; *Southern Bank v. Humphreys*, 47 Ill. 227.

When the General Assembly has undertaken to prescribe a method of obtaining jurisdiction of the persons of non-residents, and has done so, and at the same time has provided the remedy which may be resorted to by any person thus brought

into the local jurisdiction and conceiving himself to be wronged by the action of the court, it has enacted a complete code upon the subject, and the remedy given is the only remedy for the wrong which may be done under the provisions to which it is coupled. The statutory remedy supplanted all others. As no wrong was possible without the statute, the remedy given by the same statute is necessarily exclusive. So it has become a legal maxim that where a new right is given and a specific remedy for its violation provided by statute, the statutory remedy must be pursued. *Ward v. Severance*, 7 Cal. 126; *Roberts v. Landecker*, 9 Cal. 262; *Fuller v. Edings*, 11 Rich. (S. C.) 239; *Butler v. State*, 6 Ind. 165; *Victory v. Fitzpatrick*, 8 Ind. 281; *McCormack v. T. H. R. R. Co.*, 9 Ind. 283; *Cole v. Muscatine*, 14 Iowa, 296; *Hazen v. Essex Co.*, 12 Cush. 475; *Camden v. Allen*, 26 N. J. L. 398; *Brown v. White Deer*, 27 Pa. St., 109; *Babb v. Mackey*, 10 Wis. 371.

MR. CHARLES HUGHES, for appellee.

A decree of divorce obtained by fraud is void, has no binding effect and may be impeached and set aside, even though a subsequent marriage by one of the parties may have been consummated, and children born by such marriage. *Adams v. Adams*, 51 N. H. 388; *Edson v. Edson*, 108 Mass. 590; *Comstock v. Adams*, 23 Kans. 513; *Graves v. Graves*, 36 Iowa, 310; *Rush v. Rush*, 46 Iowa, 648; *State v. Whitcomb*, 52 Iowa, 85; *Borden v. Fitch*, 15 Johns. 12; *True v. True*, 6 Minn. 458; *Crouch v. Crouch*, 30 Wis. 667; *Johnson v. Coleman*, 23 Wis. 452; *Jackson v. Jackson*, 1 Johns. 424; *Lawrence v. Lawrence*, 73 Ill. 577.

Lapse of time is no bar to bringing suit to impeach a decree, including divorce decrees, obtained by fraud, when cause is shown for delay, and that the party seeking to impeach such decree is not guilty of *laches*; but the proof must be clear that the party is entitled to the relief prayed for. *Adams v. Adams*, 51 N. H. 388; *Johnson v. Coleman*, 23 Wis. 452; *Sloan v. Sloan*, 102 Ill. 581; *Oakley v. Hurlbut*, 100 Ill. 204; *Lequatte v. Drury*, 101 Ill. 77; *Furlong v. Riley*, 103 Ill. 628;

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Warden v. Cornell, 105 Ill. 169, 178; Collier v. Beers, 106 Ill. 150; Cleaver v. Green, 107 Ill. 67; Boyden v. Reed, 55 Ill. 458; Castner v. Walrod, 83 Ill. 171.

The Statutes of Limitation will not begin to run until the discovery of the fraud complained of, especially where the adverse party conceals the fraud. McIntosh v. Saunders, 68 Ill. 128; Inter. Bank v. Jenkins, 104 Ill. 143, 155; Henry Co. v. Drainage Co., 52 Ill. 299; Wear v. Skinner, 46 Md. 257; R. R. Co. v. Mayo, 67 Me. 470.

CONGER, J. This is a bill in the nature of a bill of review brought by appellee in the Piatt Circuit Court, December 22, 1883, to impeach and annul a decree of divorce obtained by appellant in said court at its September term, 1869, on the ground of fraud.

Appellant and appellee were married at Montevideo, Uruguay, August 15, 1862, where they continued to reside until 1863, when they removed to California, and remained there until April 10, 1865, at which date Caswell sent his wife to her father's home in Brooklyn, New York. Upon the same day he mailed a letter to her father, James M. Willis, which says, among other things:

"My wife and boy left me to-day for New York in pretty good health. I could not leave to go with them although should liked to have gone. The doctor says a sea voyage will do her good and she must have exercise when she reaches New York and not take much medicine as she has taken too much already. I can not write to explain many things to you now which I will when I see you, although I know that you have lived with her longer than I have, but I think I understand her case pretty well. I shall be very lonesome now for a while. Good-bye. From your son,

"D. H. CASWELL."

Appellant continued to correspond with his wife and in the summer of 1866 visited her in Brooklyn and during the fall following they both removed to Cairo, Illinois, where they lived together until March, 1867, when appellant again sent his wife to her father's home in Brooklyn, continuing a cor-

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respondence with her and occasionally sending her money, until he again visited her in Brooklyn in October, 1867, their daughter Catharine having been born some weeks before on September 29, 1867. After remaining with his wife until November 14, 1867, appellant left Brooklyn with the avowed intention of returning to Illinois to work at his trade of millwright, which he did, and on the 17th of the same month writes to her from Decatur, Illinois, that he had arrived in safety, etc., and expresses a hope that the baby and herself are well, etc. From this date until November 15, 1868, he continues to correspond with her, writing to her about once a week such letters as would ordinarily pass between husband and wife, informing her as to his business prospects, where he had worked, inquiring as to the health of herself and child, acknowledging receipt of letters from her and occasionally sending her money.

On the 15th of November, 1868, appellant writes to his wife from Decatur telling her he is going to work the next morning in a mill near Taylorville and instructs her to write him there, sends her \$5 and says he will send her more when he gets through with the job, and as soon as he knows what he will do, or where he shall go, he will let her know, etc., and concluded: "I hope this will find you and baby well, as it leaves me at present, * * * so good bye—with a kiss for baby, from your husband,

"D. H. CASWELL."

Fifteen days thereafter, on the 1st day of December, 1868, appellant filed in the Piatt Circuit Court a bill for divorce against appellee; charging that on December 10, 1865, his wife without cause deserted him and had for more than two years past persisted in such desertion.

Having thus set in motion the legal machinery which he hoped would sever the marital relation existing between himself and appellee, appellant six days thereafter—to prevent his victim from being uneasy or suspicious at the long silence that was to follow, wrote her the following letter:

"TAYLORVILLE, Dec. 6, 1868.

"*Dear Wife:* I will try and write you to-day, as I have

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found out what I think that I shall do this winter, and where I shall go, as I told you in my last, that I was waiting to see some men that I expected here and they have come and I have made arrangements with them to go to Mexico. They are going to build a mill there and as I talk Spanish and can do the work on the mill and understand quartz mills too, as it is to be a quartz mill, they offer me \$150 per month and board, so I think that the best thing I can do is to go. No doubt but that you will think it is a good ways off, but what is the difference whether I am here or there, if I can do better there than here. I think it is the best thing to go, for a man can not do anything without money, that you know as well as I do, and if I live, I think I shall do well there with the wages and I can save something to come home with in the spring. We shall start in the morning at six o'clock. There is five of us, the two men that I am going with and two others besides myself, and the men's names that I go with is Williamsons, and we shall go from here across the country into Texas and from there to Mexico with teams, and we expect that it will take us six weeks or two months to get there this time of the year, and if I have a chance to write on the way I will do so and if I have not, you will have to wait till I get there.

"They say it is a wild country that we shall go through, and if so, I don't expect that I shall have any chance to send any letters back. We have teams enough, so I shall take all my things, tools along, as well.

"Now, you will not go to feeling bad about my going, for I have considered it all over many times before I made up my mind to go; so, as we leave early in the morning, you need not write till you hear from me again, for I have forgotten the name of the place where we are going to, so I can not tell it to you now, although it is a Spanish name. I will send you \$5 by this, for it is all I can spare now, for I have not got much and Walter Lovejoy owes me \$20, and I will write to him and tell him to send it to you; so if you want it before you get any more from me, send to him for it and tell him that I wrote to you to do so, and if he can not send it all at once, he can send you \$5 at a time till he pays you what he

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owes me ; for he has not paid me anything, nor sent me any money either ; so I think that you can get along with the \$5 I send you and the \$20 he owes me till you hear from me again, although you need not feel bad if you do not hear from me till I get there, for if it is as they say, I don't suppose I shall have any chance to send any letters back. So take good care of the baby and don't spoil her, and when I get back I shall want to see a fine child of her.

“ So remember me to all, and I hope this will find you all well, as it leaves me. So good-bye. From your husband,

“ D. H. CASWELL.

“ P. S.—Write to Jane and Walt, and I think they will send you that money when you want it. I will tell them to do so.

“ DAN.”

Appellant, however, instead of going to Mexico, in January following, before any decree had been rendered upon his bill for divorce or any evidence had been taken thereon, went to Dayton, Ohio, and there married. His own explanation of this proceeding is as follows. “ I was married to my present wife in January, 1869. It happened in this way: I was called away from here, on business, to Cincinnati. I had no intention of marrying when I left. I told Bixby I was going away, and would, perhaps, be gone some little time, and I supposed that this decree would be granted, as I understood from McWilliams, and to see him and get the papers. I got a letter from Bixby, saying he had seen the lawyer and got the papers all right, to hurry back, or something like that. I went from Cincinnati to Dayton, and met the lady I married, and we talked the matter over and concluded to get married to save a little expense. I had no money to waste. We got married and came to Illinois, and found the divorce had not been granted. I was misled by Bixby's statement. He told me afterward he referred to some patent papers. I said nothing to anybody until the divorce was secured, and then we went to Indiana, at Fort Wayne, and were re-married by a Justice of the Peace.”

On the 18th of February, 1869, appellant and his friend Bixby appeared before the master in chancery of Piatt

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County, and gave their testimony to be used in the divorce suit of appellant, as follows, as shown by the master's report:

"The testimony of Daniel H. Caswell, who swears that he was married to Anna M. Caswell, at Montevideo, on the 15th day of August, 1862, and that they lived together as man and wife until December 10, 1865, when she left him without any cause or provocation, and has continued to remain away, separate and apart from him ever since. She left him against his will. He lived in Piatt County when the bill was filed, and had been a resident of Illinois between three and four years prior to the filing of the same. Always provided his wife with such comforts as he was able to provide. It was about two years since he had heard from her, and he did not then know where she was.

"Also the testimony of Bixby, who swears that he was present at the marriage. That the parties lived together until December, 1865. Caswell was a good husband. Always understood that his wife deserted him. She has lived separate and apart from him since she left him, December, 1865."

To show that this man Bixby was a willing and guilty party in this infamous fraud, it is only necessary to refer to the part he took afterward in misleading and deceiving appellee.

Hearing nothing further from her husband, appellee on March 30, 1869, wrote to Bixby, who was, as she supposed, a friend, having acted as groomsman at her wedding, as follows: "Mr. Bixby, Sir:—Will you be so kind to let me know when you heard from my husband, D. H. Caswell, and send me his address and oblige his wife and child, also his mother;" to which letter Bixby replied as follows:

"DECATUR, April 11, 1869.

"MRS. CASWELL:

"Your note of inquiry of 31st March is received. In reply I can only say that some four or five months since Dan left this place as he said to go to Mexico, to what part he did not know, but would write me as soon as he found a permanent stopping place, but as yet have heard nothing from him. I expect to hear from him as soon as he is located.

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“Will let you know as soon as I hear from him, or I presume he will write you when he knows where he will locate.

“Yours very truly,

“A. F. BIXBY.”

And again, on August 5th, in answer to a further inquiry from appellee, he writes the following answer:

“DECATUR, August 5, 1869.

“MRS. CASWELL:

“Your note of inquiry of the first instance is received. As to Mr. Caswell’s whereabouts I am unable to give you the least information. The last I saw of him was in Decatur, and he then informed me that he was going to Mexico. Did not say whether alone or with others, promising to write me when permanently located. I asked him when he thought of returning and he said never. I says, you are joking. No, he says, I am not. Taylorville is about forty miles from Decatur. I may go down there some time, and if so, I will see what I can learn and let you know the result of my investigation. I have already written to friend Brown what I know in answer to a letter from him. My respects to all.

“Yours truly,

“A. F. BIXBY.”

Upon the testimony of appellant and Bixby alone, a decree of divorce was rendered at the September term, 1869, of the Piatt Circuit Court.

Appellant having now accomplished his purpose of procuring a divorce from appellee, desiring that she should know the fact, but be kept in ignorance of the charge upon which it had been procured, the means used or the place where it had been granted, proceeded to Evansville, Indiana, and there writes to appellee the following letter:

EVANSVILLE, INDIANA, October 27, 1869.

“*Mary*:—I am now prepared to let you know the reason of my long silence is absence from the country, and I also have to inform you that by the laws of this State, I have procured a divorce from you, on the ground of incompatibility of temper and disposition, and hereafter I hold myself free from you forever. Before this reaches you I shall be on my way back

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to Mexico; so you need not expect to see or hear from me again.

“Yours,

“D. H. CASWELL.”

Upon receipt of this letter appellee caused search to be made in Indiana, and became satisfied that no decree had been granted by the courts of that State. It appears from the evidence that from this date up to 1881 appellee never again heard from, or of her husband. She states that she was in poor health and without property or means of support for herself and her daughter Catharine, except her daily labor; that she fully believed appellant had gone to Mexico; and that she was constantly during those years using every effort within her power to get some trace of him. In August, 1881, appellee, in looking over a directory of Nashville, Tennessee, discovered appellant's name and address, and at once wrote to him, and received an answer dated September, 1881, saying that he was surprised that she should address him as her husband, for, he says: “You well know that some twelve years ago I procured a divorce by law, and legally as the law directs, so you have no claim on me whatever.”

Hoping to be able to go to Nashville, to see her husband, upon such means as she might save out of her earnings, she waited until the spring of 1883, when, finding it impossible to obtain the necessary funds in this way, she borrowed money and went to Nashville, saw her husband, and for the first time satisfied herself that there had been a decree of divorce pronounced against her, and the place where it occurred.

She swears that she saw at that time a copy of the decree as rendered by the Piatt Circuit Court in 1869, and that up to that time she had no knowledge outside of her husband's letters, *supra*, of the fact that a divorce had been granted, and no information, or even suspicion, of the court rendering it.

Returning to New York, as soon as she could obtain the necessary means to do so, she came to Illinois, and filed the bill in this case in the Piatt Circuit Court on the 22d day of December, 1883, giving a history of the divorce proceedings, including bill, evidence and decree, and alleging that such decree was obtained by fraud, and praying that the same might be canceled and annulled.

Appellant appeared, answered the bill, and was examined as a witness in his own behalf. Upon a final hearing the court below found the facts charged in appellee's bill to be true, and decreed that the said decree of divorce obtained in 1869 by said appellant in the said court should be and was thereby declared to be annulled, set aside, and to stand impeached and forever void. A bare reading of the foregoing facts is enough, we think, to satisfy any candid mind that the divorce proceedings, from first to last, were conceived in sin, and brought forth in iniquity. That it was not only a fraud practiced upon appellee, but upon the court, which was made use of to accomplish the wicked designs of appellant.

It may well be questioned whether, in the divorce proceedings, the court ever obtained jurisdiction of the person of appellee. She was not a non-resident at that time, for her husband had his residence in Illinois, and she was only absent temporarily, with his consent, and in such cases her residence or domicile would be the same as his. This we take it, is the uniform rule where husband and wife are living in harmony with their marital duties, though they may be residing temporarily in different jurisdictions.

But without expressly deciding this question, we have no doubt that the false affidavit, bill and evidence, together with the purpose, deliberately formed, and fully and successfully consummated by fraud and deceit, to prevent appellee from having any knowledge of the suit, and to impose upon the court, was such a fraud as to render the decree of divorce absolutely null and void, when attacked directly by bill, as in this case. *Adams v. Adams*, 51 N. H. 388; *Edson v. Edson*, 108 Mass. 590; *Sloan v. Sloan*, 102 Ill. 581.

The great lapse of time since the rendition of the decree of divorce, and the hardship of declaring it void upon the wife and children of the second marriage, have been urged upon us with great ability, as a reason why the original decree should not be disturbed.

These considerations are entitled to great weight, and it would afford us great satisfaction to protect all the innocent sufferers of this fraud, from the sad consequences that must

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inevitably fall upon some of them. But that is impossible. If appellee is refused relief, herself and child are cruelly wronged without fault, and without a hearing. While on the other hand, if this decree is sustained, the innocent children of appellant must suffer for his wrong.

While these consequences are ample reasons for the most careful deliberation, they are none why the law applicable to the case when determined from the best light attainable, should not be announced and enforced.

The law is, as we understand, that mere lapse of time is no bar to bringing a bill of review to impeach a former decree for fraud, when the proof of fraud is clear, and there are cogent and convincing reasons given for the delay. *Adams v. Adams*, 51 N. H. 388; *Sloan v. Sloan*, 102 Ill. 581; *Edson v. Edson*, 108 Mass. 590.

We think appellee has given the most cogent and convincing reasons for the delay on her part. By the Evansville letter of October 22, 1869, she was led to believe a divorce had been obtained, if at all, in Indiana. She at once caused such search to be made as satisfied her that this statement was untrue. Then for nearly twelve years she believed her husband had deserted her and gone to Mexico, and during this time she seems to have availed herself of every resource at her command to find him. When, in 1881, she discovered him at Nashville, and wrote to him, he, in his answer, studiously avoids all reference to the place where the decree was obtained, and she remained in ignorance of it until she procured a copy of the decree at Nashville, in 1883.

The delay from 1881 to 1883 in going to Nashville to see appellant, is fully excused by her illness and want of means. And it can not be said that the delay of some seven or eight months in filing this bill, after discovering that a decree of divorce had, in fact, been obtained, and the place of its rendition was unreasonable, when the distance she resided from Illinois, and that her only means were to be obtained by her own labor, are considered.

"No *laches* can arise from delay in taking steps to undo a fraud, until after knowledge of the fraud has been acquired." *Jones v. Lloyd*, 117 Ill. 597.

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Appellant insists that Sec. 19, Chap. 22, R. S., controls this case, and that in all cases where there is no personal service, three years after the decree is rendered is the limit within which it can be attacked, even for fraud in its procurement; and cites *Lawrence v. Lawrence*, 73 Ill. 577, as sustaining this view.

We do not understand such to be the doctrine announced in that case. No question of fraud was made in the case, but the question was, did section 19 of the Chancery Practice Act, apply to decrees of divorce so as to make a decree, obtained upon constructive notice, binding and conclusive upon a defendant not personally served, after three years, unless application was made within such time to open it up for a new hearing, and the court held that it did. Such would be the rule when the proceedings were strictly regular, fair and truthful, even in such cases a complainant would, by the rule announced by the foregoing case, be required to wait three years before the decree would become confirmed and final against the defendant.

But that a decree may be attacked for fraud in its procurement, even after the five years allowed for suing out a writ of error, when cogent and convincing reasons are shown for the delay, is held in *Sloan v. Sloan*, *supra*.

We think the section referred to, has no application when a decree is sought to be impeached for fraud.

The Circuit Court committed no error in refusing to entertain the petition to transfer this cause to the Federal Court, as it was not, in our judgment, such a cause as could be removed.

The additional abstract filed by appellee was necessary, and the costs thereof should be taxed against appellant.

A majority of the court believing the decree entered by the Circuit Court to be right, and sustained by the proofs, it will be affirmed.

Decree affirmed.

Board of Supervisors v. The Towns of Condit and Newcomb.

BOARD OF SUPERVISORS
V.
THE TOWNS OF CONDIT AND NEWCOMB.

Bridges—County Aid—Mandamus—Scope of Inquiry—Joint Petition by Two Towns—Sec. 19, Chap. 121, R. S.—“Labor System.”

1. Upon a petition for mandamus to require the Board of Supervisors to appropriate half the cost of a bridge, the inquiry is not confined to the case made before the Board.

2. Two towns may jointly petition for county aid under Sec. 19, Chap. 121, R. S.

3. Towns which have adopted the “labor system,” as to road taxes, may claim county aid under the statute, the levy contemplated by section 19 not being confined to a money levy.

[Opinion filed August 26, 1886.]

APPEAL from the Circuit Court of Champaign County; the Hon. C. B. SMITH, Judge, presiding.

MESSRS. FRANCIS M. WRIGHT and J. W. SIM, for appellant.

MESSRS. J. L. RAY and J. B. MANN, for appellees.

Per Curiam. This was a proceeding by mandamus, to compel the appellant to appropriate, from the county treasury, one-half the cost of a bridge constructed by the appellees, the towns of Condit and Newcomb, across the Sangamon River. There was an answer to the petition and the case was tried by the court, and issues found for the appellees, and judgment awarding a peremptory writ of mandamus as prayed, with costs. The record is brought here by appeal, and error assigned upon the various rulings of the court.

It will not be necessary to refer in detail to all the points as they are made in the argument.

The proceeding is by virtue of Sec. 19, Ch. 121, R. S., and the first position taken by the appellants is as to the true cou-

struction of the phrase, "if the foregoing facts shall appear." etc. It is contended that the inquiry in the present case must be confined to the case as made before the Board of Supervisors; that the duty of the Board was to investigate and determine whether the facts, as stated, did "appear," and if not so appearing, in the judgment of the Board, then it might lawfully refuse the relief.

It would follow that, conceding this position to be well taken, *damages* would not lie. We had occasion to consider this point in the case of *The People, etc., ex rel., etc., v. The Board of Supervisors of Macon County*, 19 Ill. App. 264, and we there arrived at a conclusion adverse to the view suggested by counsel in the present case. The reasons for that conclusion were stated quite fully, and it is unnecessary to do more than refer to the opinion filed in that case.

It is urged that two towns can not jointly petition for county aid under Sec. 19. We held otherwise in *Board, etc., v. The People, etc.*, 17 Ill. App. 49, and the ruling was affirmed by the Supreme Court.

The next proposition which we will notice is that, as the town of Newcomb had adopted the "labor system" as to road taxes, and had not made a levy of 60 cents on the \$100, it was not in a position to avail itself of Sec. 19, which makes it one of the conditions of granting county aid that "the levy of the road and bridge tax for that year in said town was for the full amount of 60 cents on the \$100, allowed by law for the commissioners to raise." This town had, pursuant to Sec. 80, adopted the "labor system" as to road taxes, and had made a levy of 25 cents on the \$100 for road purposes, to be paid in labor. It had also made a levy of 40 cents on the \$100 for bridge purposes, payable in money, so that there was a total levy of 65 cents on the \$100 for road and bridge purposes, though it was not all payable in money.

If the argument of appellant is well founded the result is that Sec. 19 is not operative as to those towns which have adopted the labor system as to road taxes. It does not appear from the reading of that section that it was disagreed to be limited to a particular class of towns, and the argument

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rests upon the assumption that the only levy here contemplated is a money levy. This does not necessarily appear from the language used and we would not be justified in so construing it when the effect would be to deprive many and possibly the majority of towns, of the benefit of the section.

The spirit and intent of the act would lead to the opposite construction. We are disposed to agree with the Circuit Court upon this point and hold that the town of Newcomb was, on the facts stated, within the purview of the law, in this respect.

As to the various questions of fact discussed in the argument, we are of opinion there was enough evidence to support the finding of the court. If the questions of law were properly solved the conclusion reached was correct. We find no error in the record and the judgment will be affirmed.

Judgment affirmed.

24 562
41 515

THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Railroads—Rate of Speed—City Ordinance—Sec. 87, Chap. 114, R. S.—Action for Penalty—Right to Recover—Practice.

In an action against a railroad company to recover the statutory penalty for running a train through a city faster than prescribed by the city ordinance, it is *held*: That it is immaterial whether a signal was given as the train approached a certain crossing; that one who can show that his injury is the proximate result of the unlawful rate of speed, whether he came in contact with the train or not, is a "person aggrieved" within the meaning of Sec. 87, Chap. 114, R. S.; that he may recover the penalty regardless of his right to maintain an action for damages; and that an objection to the ordinance should have been specifically stated when it was offered in evidence.

[Opinion filed November 20, 1886.]

Chicago & Eastern Ill. R. R. Co. v. The People.

APPEAL from the Circuit Court of Vermillion County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. WILLIAM ARMSTRONG, for appellant.

Messrs. H. M. STEELY and F. BOOKWALTER, for appellees.

Per Curiam. This suit was brought to recover the statutory penalty, under Sec. 87, Ch. 114, R. S., which reads as follows: "Whenever any corporation shall, by itself or agents, run any train, locomotive, engine or car, at a greater rate of speed in or through the incorporated limits of any city, town or village than is permitted by any ordinance of such city, town or village, such corporation *shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive, engine or car, and the same shall be presumed to have been done by the negligence of said corporation or their agents;* and in addition to such penalties as may be provided by such city, town or village, the person aggrieved by the violation of any of the provisions of this section, shall have an action against such corporation so violating any of the provisions, to recover a penalty of not less than one hundred (\$100) dollars nor more than two hundred (\$200) dollars, to be recovered in any court of competent jurisdiction; said action to be an action of debt in the name of the people of the State of Illinois, for the use of the person aggrieved, but the court or jury trying the case may reduce said penalty to any sum, not less, however, than fifty (\$50) dollars, where the offense committed by such violation may appear not to be malicious or wilful. *Provided*, that no such ordinance shall limit the rate of speed, in case of passenger trains, to less than ten miles per hour, nor, in any other case, to less than six miles per hour."

There was evidence tending to show that the appellant's train passed over the road through the city of Hoopston at a greater rate of speed than allowed by the city ordinances; that Fred. Tilton, for whose use the suit was brought, was in his carriage intending to drive across the railroad when some

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person warned him of the approaching train, and turning from the road he barely avoided collision, but the horses being frightened ran away, overturning the carriage and seriously injuring the occupants. There was no contact with the train. There was a hedge on the side of the road from which Tilton approached so that he could not see the train until he got on the right of way, past the hedge.

There was some evidence tending to show that he heard the engine bell as he started from the point where his team had been standing twenty or thirty rods from the crossing: and there was evidence tending to show, on the one side, that no signal was given as the train passed the crossing, and on the other, that the proper signal was given. It is not important how this was. The action is not for damages resulting from a failure to ring a bell or sound a whistle at the crossing, but to recover a statutory penalty for running faster than prescribed by the city ordinance. The statute provides that the person aggrieved may recover for all damages done to the person or property by such train, locomotive engine or car, and in addition to such penalty as may be provided by the city, the person aggrieved by the violation of the statute, may recover a penalty of, etc., etc.

The question is, what is meant by the term "the person aggrieved," as used in the latter clause. It is contended on the one hand that it refers to one who is so aggrieved that he may recover damages for the injury sustained, and if he can not so recover he is not a "person aggrieved" in the sense here intended. That in analogy to the construction placed upon Sec. 62, in *Schertz v. I., B. & W. R'y*, 107 Ill., 577, there could be no recovery for damages in this case, because there was no contact with the train, and, therefore, the person for whose use the suit was brought in this case can not maintain the action.

On the other hand it is contended, that "the person aggrieved" is the person who has sustained an injury clearly traceable and attributable to the violation of the law, by running faster than permitted by the ordinance, and that it is not material whether he could maintain an action for damages under the first clause of the section or not.

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It is argued that one who can show that his injury is the proximate result of the unlawful rate of speed, whether he came in contact with the train or not, is "aggrieved" in the sense that term here signifies; that the term is not thereby given one meaning in one clause and a different meaning in the other, and that the person aggrieved may recover the penalty, regardless of his right to recover damages. A majority of the court hold the latter view, which was adopted by the trial court and upon which the plaintiff recovered.

The objection now urged to the ordinance, if a valid one, should have been specifically stated when the ordinance was offered in evidence. The objection was general. Had there been any specific objection it should have been pointed out at the time so that, if possible, it might have been obviated. *Doyle v. Village of Bradford*, 90 Ill. 416.

The judgment is affirmed.

Judgment affirmea.

THE BURLINGTON INSURANCE COMPANY

V.

S. M. & W. F. JOHNSTON ET AL.

Agency—Bond to Secure Insurance Company—Advances not within.

1. A bond given to an insurance company by an agent to secure the faithful performance of his duties, including an account of all sums of money, goods, notes, valuables and other property coming into his hands, does not cover advances made to him by the company.

2. In the case presented, it is *held*: That the bond in question had exclusive reference to the conduct of certain appointees as special agents; and that the sureties are not bound for individual and personal indebtedness of the agents to the company on account of transactions outside of the contract.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Burlington Ins. Co. v. Johnston.

MESSRS. KERRICK, LUCAS & SPENCER, for appellant.

PLEASANTS, P. J. The Johnstons, being appointed special agents of the insurance company for the State of Illinois, excepting Cook County, gave a bond for the faithful performance of their duties, which the other appellees executed as sureties. This action was brought upon it to recover a balance claimed to be due for advances on account of expenses, and judgment was rendered for the defendants on demurrer to the declaration, which consisted of a single count.

It set out in *hæc verba* the contract of agency, which was dated November 14, 1883, to be in force from January 1 to December 31, 1884, and showed that the Johnstons were to devote their time and labor to the interests of the company, to be governed by its printed rules and other written or printed instructions of its secretary, to do all such work as is usually required of special agents of insurance companies, to organize the business in Illinois, appoint agents therein, canvass with them and canvass themselves when not otherwise engaged in the interest of said company. For the faithful performance of these duties the company agreed to pay them as follows, *to wit*: "The actual expenses of each while traveling in the interests of said company: *Provided*, however, that the only items of expense be railroad fare, hotel bills, livery hire and bus fare, and no other items of expense shall be claimed or allowed; and provided further, that in no case shall the expense bill of either S. M. or W. F. Johnston exceed the sum of \$100 in any month during the term of this contract, and an itemized bill of expenses must be made by each and delivered to said company at the end of each month;" and in addition twenty-five per cent. of the net premiums obtained by their personal work, and five per cent. of the net premiums taken from the entire State of Illinois, but in no event were the commissions paid to agents—their own expenses and the five per cent. mentioned—taken together, to exceed thirty-eight per cent. of the entire net premium receipts from Illinois, and if they should, the Johnstons were not to claim or be paid any portion of said five per cent. in

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excess of said thirty-eight per cent. It further provided that "payments of the above amounts shall be made by the company to S. M. and W. F. Johnston monthly, in cash, at Burlington, Iowa," and that said appointees should give a bond as therein prescribed.

This contract was extended to the next year with no other change than that the commissions to agents, their own expenses and the five per cent. mentioned should not together exceed forty per cent. of the net premium receipts from Illinois.

In compliance with the contract in that behalf, the bond in suit was executed, which is also set out at large in the declaration, and by which the obligors promise and agree that said appointees shall "faithfully fulfill the terms of said contract and of all modifications and extensions of the same in writing," and "faithfully discharge all duties devolving upon them as special agents, and shall on demand deliver unto said Burlington Insurance Company, or their attorney, a correct account of all sums of money, goods, notes, valuables and other property, as such may come into their hands as special agents of said company, and shall pay and deliver unto said company, or any person authorized by said company to receive the same, all balances, sums of money, goods, valuables and other property which shall be due by them to said Burlington Insurance Company, and shall justly, faithfully and honestly serve said company as special agents during their continuance in such capacity."

It then avers that said appointees entered upon the performance of said contract, and at different times requested the plaintiff to advance money to them, as such agents, to pay commissions, expenses, etc., to enable them to carry on the said business of the plaintiff, and with the understanding and agreement that they, on demand, would pay and return to the plaintiff all money so received by and due from them; that plaintiff at divers times, at such request, did advance to them for that purpose large sums of money, and that in addition to the sums so advanced, they received, collected and retained other moneys from the patrons of the plaintiff to a

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large amount; that the moneys so advanced to and received and collected by them prior to January 1, 1885, did exceed thirty-eight per cent. of the entire net premium receipts from Illinois, and that twenty-five per cent. of the net premiums on all work done personally by them, and their actual expenses—provided for and limited as before stated—prior to said date did not exceed said thirty-eight per cent., with like averments as to the time subsequent to January 1, 1885, only substituting “forty” for “thirty-eight” per cent.; that said excess of the amount so advanced, received and collected by them over such thirty-eight and forty per cent. in said periods respectively amounted in each period to a large sum, to wit, \$3,000, whereby they became liable and promised to pay the same to plaintiff, but have neglected and refused to do so on demand, by reason whereof, and by the means aforesaid, the defendants herein became indebted and in consideration thereof promised the plaintiff to pay, etc.; but though often requested, have neglected and refused, and still neglect and refuse so to do.

It thus appears that the money sued for is not alleged to include any that was collected or received by these appointees from the patrons of plaintiff. The allegation is that the money so collected and received, together with those advanced by plaintiff, exceeded the limit of thirty-eight and forty per cent. respectively, of the net premium receipts from Illinois in the periods mentioned.

As against the pleader the intendment will be that exclusive of the sums so advanced this limit would not have been exceeded; in other words, that the balance here sued for, is solely on account of advances made by plaintiff at their request for the purpose of paying commissions to sub-agents and other expenses and to enable them to carry on the business of their agency. It is not even averred that these expenses were such as they were authorized by the contract to incur. But whatever may have been their character, the advances were made by the plaintiff voluntarily, upon request of the appointees, and with the agreement that they were to be returned or repaid on demand.

Thus it is averred that these were transactions between the

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parties who were respectively principal and agent by which the latter became bound to the former directly and not by reason of their having bound it to third parties. They were therefore not transactions by the latter as agents of the former, but in their individual capacity, and by which they became simply and directly debtors to the plaintiff.

Such were not provided for nor contemplated by the contract of appointment. There is no provision in it for the establishment of such a relation. Their indebtedness to the plaintiff was to arise only indirectly out of transactions by which they should bind it to third parties. Their expenses were to be incurred for the plaintiff, reported in itemized form at the end of each month and paid, not advanced, by the plaintiff monthly. Thus the only indebtedness between these parties for expenses, as contemplated by the contract, was to be an indebtedness from the plaintiff to the appointees, and not from the latter to it. Those for which these advances were obtained were incurred by them primarily for themselves, although the company might also indirectly be benefited by them.

The bond of defendants had reference exclusively to the conduct of these appointees as special agents under the contract. It did not bind the sureties for their individual and personal indebtedness to the company on account of transactions outside of the contract.

We think the demurrer was properly sustained and the judgment will be affirmed.

Judgment affirmed.

ALBIGENCE H. BROWN AND CHARLES F. EMERY
V.

SYLVANUS SHURTLEFF.

Trust Deed—Partition—Sale of Portion of Premises—Bill for Contribution.

Upon a bill filed by the owner of a portion of a tract of land subject to a trust deed, securing a note, a balance on which he had been required to pay, against the owners of other portions for contribution, it is *held*: That the

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lien of the trust deed was not affected by certain partition proceedings, wherein a certain part of the premises was set apart on account of the debt secured by the trust deed; that the acceptance by the holder of the note of the proceeds of the part so set apart did not extinguish the trust deed; that the sale by the trustee of the complainant's portion of the premises was legal; and that he thereby became entitled to contribution from certain of the defendants.

[Opinion filed November 20, 1886.]

APPEAL from the Circuit Court of De Witt County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. OTTEN & VAIL, for appellants.

Messrs. MOORE & WARNER, for appellee.

PLEASANTS, P. J. Appellee filed the original bill herein as purchaser of a portion of a tract of land subject to incumbrance, which he paid, against the owners of other portions, for contribution. The following is an outline of the case made by it.

In March, 1871, John Adkisson died intestate, seized of 234 acres of land in DeWitt County, and leaving a widow, Corilla, and three sons, Thomas B., Horace and Frank, his only heirs, of whom the last named was a minor.

In 1874, to avoid a forced sale of land to pay debts of the estate, the widow and adult sons borrowed of appellant Brown, through Emery, \$2,000, for which they gave their note at five years, with interest at ten per cent. per annum, payable semi-annually, and to secure it executed a deed to Emery, as trustee, of their interest in 139 acres described, including the home farm.

To the August term, 1875, of the Circuit Court they filed a petition for dower and partition, suggesting that ten acres of the tract described in the trust deed, if sold in lots to suit purchasers, would probably bring enough to pay off that debt, and asking that such amount be so sold for that purpose, and the residue of all partitioned, or that all be partitioned and the incumbrance apportioned among the co-tenants. The mi-

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nor son and Emery, the trustee, were made defendants, but the latter did not appear, and Brown was not a party named. A decree was made according to the prayer of the petition. The land embraced in the trust deed was divided into five parcels, of which lot one, of ten acres, was ordered to be sold to pay the Brown debt; lot two was set off to Horace; lot three to Frank; lot four to the widow, as part of her dower, and lot five to Thomas B. The part not covered by the trust deed was also partitioned to the satisfaction of the parties.

Horace paid one-third of the debt and had his lot released. The master, some years afterward, sold lot one, and paid over the proceeds, amounting to \$1,076.40 after deducting the costs and expenses, to the trustee. No further payment being made, the trustee, by direction of Brown, who still held the note, advertised the premises, excepting said lots one and two, to be sold on January 20, 1882.

Meanwhile, in January, 1876, Thomas had conveyed his lot five to Andrew Hutchin, whose deed recited the liability of the land so conveyed for any balance of the mortgage debt that might remain after the application of the proceeds of lot one, but expressly limited the grantor's personal liability to the grantee on that account to \$200. On February 26, 1876, Hutchin conveyed twenty-one acres of said lot five to appellee, and another portion to P. H. Mills, and on the 6th of March following, the residue to Jacob Vogle, who, on March 21, 1878, conveyed to George W. Ely, and he, on the same day, to Samuel Dunmire.

On the day advertised for the trustee's sale, as above mentioned, the widow paid him \$450, which was understood to be or to make up her full share of the debt, and the trustee sold the portion of lot five which had been conveyed to appellee for the balance, \$685.66. It was bid off by John Warner, for the benefit of appellee, who reimbursed him the amount so paid. The bill made defendants, the widow and sons, and Hutchin, Mills, Vogel, Ely, Dunmire and Warner, and prayed that the owners of lot three and the other portions of lot five (conveyed by Hutchins to Mills and Vogle) contribute and pay to complainant their due proportions of the amount he had so

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paid, and for general relief; and after demurrer thereto sustained, an amendment was filed to the December term, 1882, making Brown and Emery defendants also, and praying that Emery be required to answer as to payments, fees and expenses made on said loan, and if he or Brown, or both, had received any money thereon to which they were not entitled, they be decreed to pay it back to the proper parties; that the deed from the trustee to Warner be set aside, and for general relief.

All the defendants answered, some severally and others jointly and severally, and by cross-bill of Vogle, Mills and Dunmire, two grantees of the remainder in fee of a portion set off to the widow for her dower, were brought in and answered it. Replications were filed and proofs taken. It is unnecessary, however, to notice these further pleadings or the proofs, since they present nothing that modifies the bearing of the facts set forth in the bill, which are clearly established and present all the equities in the case.

On final hearing the court found that Emery, being a party to the partition proceedings, was bound by the decree therein; that Brown also, by accepting the proceeds of the master's sale of lot one under it, ratified and was bound by it; that said sale and payment over of the proceeds to the trustee released or extinguished the trust deed; that complainant was not entitled to contribution from anybody because his land was not subject, at the time it was sold, to the lien of the trust deed; that the sale of it by the trustee was unauthorized and illegal and the payment by Warner to him, for the benefit of complainant, of the \$685.66, was compulsory, and therefore ordered that the trustee, within sixty days, repay it with interest to date of decree, making \$850.96 and interest thereon from that date, until paid, and that his deed to Warner be set aside. The bill was dismissed as to all defendants except appellants, and the costs were adjudged against Emery.

We must think these findings and orders were all wrong. As we understand it, the partition decree did not purport, nor does it otherwise appear that it was intended to affect any right of Brown as then existing under the trust deed.

Nothing of the kind was asked of the court. The petition was to set apart a small portion of what was embraced in the deed, not in absolute substitution for the whole as security to the creditor, but as a means of raising, if it would raise, enough to release the residue. Whether it would or not was then uncertain. The arrangement was proposed as in the interest of the debtors and of no concern to the creditor, and the order simply authorized the experiment.

But if it had been asked, and right in itself, the court was without power to do it. In the deed, which was on record, Brown was named as having all the beneficial interest, and Emery only the naked legal title, as such was the fact; yet Brown was not made a party to the proceeding, nor represented therein by Emery, who was. Therefore the decree could not, of its own force, bind him. *McGraw v. Bayard*, 96 Ill. 146; *Land Co. v. Peck*, 112 Ill. 408, 435.

And if the court had possessed the power, it would have been error so to use it. The debt was just and the security freely given. There was no pretense that anything had since occurred to change the equities of the parties further than it had paid the debt. Upon what notion of law or right, then, could the court modify the contract or make a new one, or release any part of the security? The parties most interested did not so understand it, as is shown by the original bill, by the deed to Hutchin and by the widow's payment.

Then, since the decree itself did not contemplate the extinguishment of the trust deed until the debt should be fully paid, Brown's acceptance of the proceeds of the master's sale in pursuance of that decree could have no such effect. His note was then due. The money so received paid it in part. It was raised by sale of part of his security, and it was immaterial to him whether such sale was made by his debtors or by the master or by the trustee.

It follows that the sale by the trustee of appellee's parcel to make the balance remaining due was not illegal. It was provided in the trust deed that in default of payment he might at once proceed to sell the property thereby conveyed, "entire, without subdivision, or in parcels and subdivisions," in his

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discretion, and the fact that this parcel was sold rather than some others, by an understanding with their owners and in fear of an injunction, if he attempted to sell them, would furnish to appellee no ground of complaint or relief as against the trustee or Brown. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556, 559.

But the sale of his land did entitle him to contribution from others in like case, as to liability for the debt. It had been contracted for the common and equal benefit of those who inherited in common the land pledged for its payment. From the record, as it stands, it appears that Frank is chargeable with one-third. *Pitsworth v. Stout*, 49 Ill. 78; *Freeman on Co-Ten. & Parc.*, Sec. 512. For the same reason Thomas B. was chargeable for the same proportion, but he has discharged it upon Hutchin, except as to \$200. This sum he should pay, and the residue of his original third be charged to Hutchin, if he is solvent, and if not, to his grantees, in the inverse order of alienation from him.

The decree will be reversed and the cause remanded, with directions to ascertain the amounts due by way of contribution from the other parties liable, and decree that they pay the same to complainant.

Reversed and remanded, with directions.

SANDIE BROWN
V.
BIERMAN, HEIDELBURG & COMPANY.

Sales—Rescission—Fraud—Replevin to Reclaim Goods from Third Party—Evidence—Depositions in other Suits—Report to Mercantile Agency—Preconceived Intention not to Pay—Knowledge by Defendant—Father and Son.

1. In an action of replevin to reclaim goods sold to the defendant by his son, who, it is claimed, had purchased them of the plaintiffs, "with the preconceived intention not to pay," and of which intention the defendant is alleged to have had knowledge, it is *held*: That certain depositions, taken in cases in which the defendant was not a party, to prove fraudulent repre-

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representations by the son to third persons, were improperly admitted by the court below; that the report of the son's financial condition, made by an agent to a mercantile agency, was also improperly admitted; that the evidence does not support the finding that the defendant, when he purchased, knew that his son purchased the goods in question with a preconceived intention not to pay for them; and that their relations as father and son and creditor and debtor, and certain other circumstances relied on, are insufficient to charge the defendant with knowledge of any fraudulent intention on the part of his son.

2. Fraud must be established by evidence so clear and cogent that it leaves the mind well satisfied that the charge is true.

[Opinion filed January 14, 1887.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. ALLEN, BROWN & BROWN, for appellant.

We insist that the evidence could not be stronger of the good faith of appellant in the entire transaction, and that there is really nothing in the way of imputation, or even suspicion of fraud, or knowledge or notice of the same, in this entire record against him. Such being the case, the verdict of the jury, in finding for appellees, should have been set aside by the court below. C., R. I. & P. R. R. Co. v. Dingman, 1 Ill. App. 162; Dunton v. Chamberlain, 1 Ill. App. 361; Reid v. Furness, 11 Ill. App. 645; Munson v. Farwell, 16 Ill. App. 365; Catlin v. Warren, 16 Ill. App. 418; C., R. I. & P. R. R. Co. v. Herring, 57 Ill. 59; C., C. & I. Ry. v. Troesch, 57 Ill. 155; Davenport v. Springer, 63 Ill. 276; Schwartz v. Lammers, 63 Ill. 500; Palmer v. McAloy, 58 Ill. 24; Bonnell v. Wilder, 67 Ill. 327; C., B. & Q. R. R. Co. v. Stumps, 69 Ill. 409; St. P., F. & M. Ins. Co. v. Johnson, 77 Ill. 598; C. & A. R. R. Co. v. Rice, 71 Ill. 567.

Appellant's purchase having been made in good faith and for a valuable consideration, accompanied with possession, should have been protected. He had no participation in the fraud or misrepresentations of Charles R. Brown, even though there had been proof of such, and therefore should not have been prejudiced thereby. Brown v. Riley, 22 Ill. 45; Neece

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v. Haley, 23 Ill. 416; Chaffin v. Kimball, 23 Ill. 36; Moore v. Bracken, 27 Ill. 23; Kranert v. Simon, 65 Ill. 344; Gavagan v. Bryant, 83 Ill. 376; Miller v. Kirby, 74 Ill. 242; Cole v. Cosgrove, 16 Ill. App. 167.

Messrs. SANDERS & HAYNES, for appellees.

Where a purchaser from a fraudulent vendor has knowledge of such facts as would excite the suspicions of a man of ordinary prudence and capacity, and shuts his eyes and refuses to inquire, he does not purchase in good faith, and is affected with notice of fraud upon prior creditors affected by the sale. State v. Esdell, C. & J., 6 Mo. 396.

If facts are brought to the knowledge of a party which would put him, as a man of common sagacity, upon inquiry, he is bound to inquire, and if he neglects to do so he will be chargeable with notice of what he might have learned upon examination. Bigelow on Frauds, 288; Hanchett v. Kimbark, 19 Chi. Leg. News, 61.

Although there were no fraudulent misrepresentations or false pretenses, yet the purchase of goods on credit, by one who has formed a preconceived design not to pay for them, is such a fraud as would render the sale voidable. Rowley v. Bigelow, 12 Pick. 307; Garbutt v. Bank, 22 Wis. 384; Morrill v. Blackman, 42 Conn. 324; Andrew v. Deitrich, 14 Wend. 31.

PLEASANTS, P. J. This case, in its facts, is substantially like that of Henry W. King & Co. v. Sandie Brown, of this term. [See *post*, p. 579.] Appellee's firm also sold goods to Charles R. Brown about the same time, and brought this suit against appellant to recover what remained of them after he had purchased the stock of said Charles and taken possession thereof as stated in said opinion. The result, however, was different, being in favor of the plaintiffs, and also the specific fraud relied on as the ground of their right to rescind their sale and reclaim the goods, which was that Charles purchased of them "with the preconceived intention not to pay," and the defendant of him, with knowledge of such intention. Only two instructions, both right in the abstract, were asked

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on their behalf, and given: first, that if, from the evidence, the jury believed these propositions of fact, they should find for the plaintiffs; and second, that fraud may be shown by circumstances, without direct proof. All that were asked by the defendant were also given.

There was no pretense of any fraudulent misrepresentation by Charles to plaintiffs; but to establish the different and specific fraud charged against him they attempted to show such misrepresentations to others, and for that purpose offered depositions taken by them in suits against him to which appellant was not a party, with what purport to be copies of letters between them attached to said depositions as exhibits, which were admitted over objection.

That proof of the fraud imputed to Charles was essential to a case against this defendant is clear, and if it be admitted that this might be shown by his fraudulent misrepresentations of his financial condition to others of whom he made purchases about the same time, still the proof of such misrepresentations must be made by evidence competent as against this defendant, and since he was not a privy of Charles in respect to the property in question—his title to it not depending upon the validity of Charles' title as against the plaintiffs—we do not understand upon what principle depositions taken in suits against Charles, to which he was not a party, of witnesses whom he had no right or opportunity to cross-examine, can be so regarded. Wharton on Ev., Sec. 177.

The report of Charles' condition and standing made by the witness Warren to the Dun Mercantile Agency was objectionable for the same and other reasons. He said it was made from his recollection of Charles' statements and information from others, and the parts were not distinguished as to their respective sources. He did not say he had forgotten that statement or any part of it, nor that the report was made at the time of the statement and he then knew it was correct; nor that Charles had ever seen or authorized it; and so no reason is perceived why, even as against Charles, he should not have been required to testify, like other witnesses, from present recollection of facts, refreshed, if he desired it, by refer-

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ence to his report as to any other proper memorandum, without admitting the report itself as evidence. But counsel did not discuss these questions and we have not thought them of sufficient importance in this case to require a careful examination.

We reverse the judgment, because in our opinion the evidence admitted was not of a character or sufficient to support the finding that appellant knew, when he purchased, that Charles intended, when *he* purchased, not to pay for these goods. The circumstances urged as justifying it, are, that they sustained the relation of father and son; that appellant loaned Charles nearly all of the capital on which he went into the business, and which all went to pay for the goods then in the store; that this fact was not made known by appellant to appellees and others of whom Charles afterward made purchases to keep up his stock; that they had occasional interviews in which there was more or less talk about the business; that after two years and a half the indebtedness of Charles for this loan was not reduced; that appellant did not sooner take measures to collect or secure it; that just before purchasing he consulted lawyers, first in St. Louis, where he resided, and afterward at Springfield, where Charles was carrying on the business, and upon advice of the latter changed his plan of taking judgment notes to that of an outright purchase, so shortly before the bills made by Charles for fall purchases matured.

Now, if it were conceded that when Charles purchased the goods in controversy he positively intended never to pay for them, which is by no means satisfactorily proved, even as against him, these circumstances would not tend to show that appellant had any knowledge of such intention, or of any fact that should have put him upon inquiry in respect to it. At most, they are no more than grounds of suspicion that he may have known it. But fraud is not to be presumed. It must be established by proof. And, as was said in *Shinn v. Shinn*, 91 Ill. 477, "something more than suspicions are required to establish it. The evidence must be clear and cogent, and leave the mind well satisfied that the charge is true." In the

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light of the facts clearly proved on the part of appellant, and which are stated in the opinion in *King & Co. v. Sandie Brown*, above referred to, and apply as fully to the case of these appellees, even the grounds for suspicion, as to appellant, are shown to be unsubstantial. We find nothing in this record to overcome the presumption, to which he was entitled, that he was an honest man. His dealing with his son in all its course appears to us to have been natural and entirely consistent with good faith. The verdict was so plainly against the evidence, if not wholly without any to support it, that it ought to have been set aside and a new trial granted. For the error of the court below in refusing so to do, the judgment will be reversed and the cause remanded.

Reversed and remanded.

HENRY W. KING & COMPANY

V.

SANDIE BROWN.

Sales—Fraudulent Representations in Purchase of Goods—Subsequent Sale by Purchaser to Father—Rescission—Replevin—Evidence—Instructions.

1. To warrant the rescission of a sale the vendor must show actual fraud, consisting in a positive intention of the vendee, at the time of the purchase, not to pay, or in false representations as to his ability to pay.

2. Known insolvency is not sufficient proof of an intention not to pay for goods purchased.

3. In an action of replevin to recover goods sold to the son of the defendant prior to the transfer, by the son to the father, of the stock of goods in payment of a large indebtedness, it is *held*: That the evidence sustains the verdict for the defendant; that it does not appear that the defendant had knowledge of any fraudulent or false representations made to the plaintiffs by his son; that knowledge that his son was in embarrassed circumstances would not put him on inquiry as to whether he had committed fraud; and that there is no substantial error in giving and refusing instructions.

[Opinion filed January 14, 1887.]

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In connection with this case see the related case of Brown v. Bierman, *ante*, p 574.

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. BRADLEY & BRADLEY and W. D. CARPENTER, for appellants.

Messrs. ALLEN, BROWN & BROWN, for appellee.

PLEASANTS, P. J. In the winter of 1881-2, Charles R. Brown, who had previously resided at St. Louis with his father, the appellee, came to Springfield and engaged as clerk in the old established clothing and tailoring house of his cousin William S. Hunter. After a few months of such service he bought a half interest in the business for \$10,000, of which his father advanced for him the sum of \$9,000, taking his note therefor, payable one day after date with interest at eight per cent. About a year thereafter Hunter sold his remaining interest to P. P. O'Donnell, and in February, 1884, Brown bought out O'Donnell for \$6,188, being sixty-eight per cent. of the invoice price. He paid down \$1,000, and for the residue gave his two notes indorsed by his father and uncle.

Appellee was then and for many years had been in business with Jaccard & Company, a large jewelry house in St. Louis. He was here a few times while his son was carrying on this business, and the latter visited the family at St. Louis monthly or oftener, arriving late on Saturday evening and returning early Monday morning. From the little conversation between them on that subject upon these occasions, from Charles' expressed desire to change his location, and from his own general observation when here, appellee got the impression that the situation was not altogether satisfactory, but he had no particular or definite knowledge of it, nor made any special inquiry respecting it. Only the first year's interest on his note for \$9,000 had been paid. He knew, in a general way, that Charles was owing some debts to other parties for goods,

and in the latter part of the summer or fall of 1884, became apprehensive that he would not be able to "pull through." About the first of November he learned from O'Donnell that the note to him for \$3,188 was wholly unpaid, though past due, and was pressed for payment. The other, for \$2,000, was in bank and about to become due. Thereupon he consulted counsel, came to Springfield, and after further legal advice taken here, bought the entire concern in satisfaction of his own claim and the indebtedness to O'Donnell, which he then assumed and afterward paid. His claim, thus increased, amounted to about \$17,000. The goods invoiced at about \$21,000, but the uncontradicted testimony is that they were not worth more than 50 cents on the dollar, and less was realized on them by appellee. The notes and accounts, together amounting to something like \$3,000, were worthless. Charles had paid for his spring purchases. Those made for the fall were received in August and September, on four months' time, and aggregated from \$2,500 to \$3,000. Among them was a bill of clothing of \$866, bought of appellants, on representations by him respecting his financial condition which they claim were false and fraudulent.

On the 4th of November, the bill of sale to his father was executed and the stock delivered. It was put in charge of Mr. Culver, who had been a salesman under Charles, but he employed new help and proceeded to dispose of it according to directions of appellee.

Appellants then brought this suit in replevin for the goods so bought of them. The verdict was for the defendant, finding the property to be in him, and awarding 1 cent damages. A motion for a new trial was overruled, and judgment entered on the verdict, from which the plaintiffs took this appeal.

The foregoing facts, with the representations by means of which Charles R. Brown obtained the goods in controversy, show the whole case made for plaintiffs. It presented two questions of fact: first, were these representations fraudulent on the part of Charles; and second, was defendant chargeable with notice of this fraud when he purchased of him.

To entitle plaintiffs to recover, they were required to estab-

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lish the affirmative on both by a preponderance of evidence. Authorities can hardly be necessary, but with special reference to the second, we cite the following: Gavagan v. Bryant, 83 Ill. 376; Schweizer v. Tracy, 76 Ill. 345; Miller v. Kirby, 74 Ill. 242; Kranert v. Simon, 65 Ill. 344; Hessing v. McCloskey, 37 Ill. 341, 352; Catlin v. Warren, 16 Ill. App. 418; Axtell v. Cullen, 3 Ill. App. 527; Storey v. Agnew, 2 Ill. App. 353.

Conceding, then, for all present purposes, that this was done as to the first, we would not feel at liberty to disturb the finding against them on the second, even if it were based on their own evidence alone. But there was very clear, positive and uncontradicted testimony on the part of defendant that he had in fact no knowledge or information whatever of any representation made by Charles to plaintiffs or to any other party of whom he bought, or that he had bought of them or either of them, nor of any fact or circumstance to excite a suspicion that he had made any fraudulent or false representations to anybody; and upon all the evidence, under any instructions that could have been properly given, a finding that he purchased *bona fide*, for value and without notice of any fraud upon plaintiffs, ought to stand.

The jury were instructed, as asked by plaintiffs, to the effect that if Charles obtained credit of them for these goods with a preconceived intention not to pay for them, or by means of fraudulent representations respecting his financial condition, they would have the right to rescind the sale as against him, and if defendant participated in the fraud, to recover in this action, and that fraud might be shown by circumstances. Those given for the defendant went still further in favor of plaintiffs, and made his right to hold the goods depend upon proof that his purchase of Charles was made "in good faith, and for a valuable consideration, and without notice of said false representations."

But appellant's principal point is that the court refused to give also the three following: 1. That if they believe from the evidence in this case that the defendant Sandie Brown, previous to the time of the purchase of the stock of goods from Charles R. Brown, knew that Charles R. Brown was in

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difficulty of a financial character, and allowed Charles R. Brown to continue in business and purchase new goods of King & Company, whether Sandie Brown knew all the facts or not, if the jury believe from the evidence that he knew enough regarding the financial condition of Charles R. Brown to put him upon inquiry, or to excite the suspicions of a prudent man, then, in purchasing said stock of goods of Charles R. Brown to cancel a pre-existing debt, he could receive no better title to said goods than Charles R. Brown had against the claim of King & Company.

2. Tells the jury that upon the same hypothesis stated in the first, the defendant "made himself a party to the fraud," if any there was.

3. That if from all the evidence in the case you believe that Charles R. Brown purchased the goods from the plaintiffs upon representations of his financial worth and standing, and such representations were false, and that plaintiffs relied upon them as true and extended to said Brown a credit for such goods, relying upon such representations as true, then no title passed by such purchase in such goods to said Brown from the plaintiffs.

This last one, applying only to the title as between plaintiffs and Charles R. Brown, would be quite useless, unless it were the law that if Charles acquired no title the defendant could acquire none through him, and was, therefore, very liable to mislead the jury to that conclusion. The proposition contained in it is clearly set forth, in its proper connection and with all its legitimate bearing upon the real issue in several of those given. We think the others were also rightly refused, as inapplicable, misleading and substantially unsound. There is no evidence in the record bringing home to the defendant the knowledge of any particular act or declaration of Charles, or of any particular fact relating to his "difficulty," that would tend to show he had misrepresented his condition. He had known from the first that Charles started in business upon a capital almost wholly borrowed, and then knew that he had not reduced that debt, and that he owed some others for goods purchased to replenish his stock; but to

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whom, how much, or upon what representation, if any, he had contracted these debts for goods, or that they amounted, in the aggregate, to any considerable sum, it appears he did not know. True, the hypothesis of these instructions is "if he knew enough regarding the financial condition of Charles R. Brown to put him upon inquiry or to excite the suspicions of a prudent man;" but that above stated is all there was to constitute "enough." And how prudent a man? Suspicious of what? Inquiry in regard to what? In *Hanchett v. Kimbark*, 118 Ill. 132, the Supreme Court say a "reasonably prudent person" and "inquiry in regard to the fraud," but the refused instructions do not. Appellee's knowledge may have been quite enough to excite his fear that his son would not be able to "pull through," and put him upon inquiry as to that, and yet have been no ground for a suspicion that he had committed any fraud. If Charles himself, with all his own knowledge of his own condition, had not falsely represented it nor indicated an intention not to pay, otherwise than by such knowledge, it could hardly be claimed that appellants could have rescinded the sale even as to him. The reason is that such a condition is not incompatible with an honest intention to pay, and to warrant a rescission of the sale the vendor must show actual fraud consisting in a positive intention of the vendee, at the time of the purchase, not to pay (of which known insolvency is not sufficient proof—*Catlin v. Warren, supra*), or in false representation of his ability to pay. How, then, can the possession of more limited knowledge of his condition as one of financial difficulty, without other indication of such fraud on the part of Charles, be held sufficient to charge appellee with participation in whatever fraud there was and avoid his title as purchaser from Charles? See *Axtell v. Cullen*, 3 Ill. App. 527. Yet these instructions in effect, as applied to this case, require no more. They import that there is such a natural connection or relation between them as cause and effect, that the obtaining of credit for goods by a merchant who is in difficulty of a financial character would of itself alone suggest that he had fraudulently misrepresented his condition. We are not willing to affirm this proposition as sound in law or

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fact. In the Hanchett case the subsequent purchasers knew much more. They had themselves charged their vendor with fraud. All that appellants here had the right to ask on this point was given, as we have seen, in other instructions. We perceive no material error in this record.

Judgment affirmed.

LOUIS MCCALL AND DANIEL ABBOTT, EXECUTORS,

v.

HENRY R. LEE.

Administration—Filing of Claim within Time Limited—Continuance—Re-instatement—Amendment—Allowance of Claim by Circuit Court—Classification—Personal Property—Life Estate, with Limitation Over.

1. Where a claim against an estate is filed in the Circuit Court in time and is continued by agreement until the final determination of another case, the clerk in the meantime omitting it from the docket, the court does not lose its jurisdiction and may re-instate the claim on proper motion and notice, although such motion is not made immediately after such other case is determined.

2. Where such a claim has been filed by an administrator within the time limited by statute, the court may subsequently allow the substitution, by way of amendment, of the party interested, in place of the administrator, as claimant, the real claimant and the basis of the claim remaining the same.

3. In allowing a claim against an estate the Circuit Court may leave the classification thereof to the County Court, which directly supervises the administration.

4. This court declines to interfere with the findings and judgment of the court below, allowing a claim against an estate for the value of certain personal property turned over to the deceased under a special agreement creating a life estate with limitation over in remainder.

[Opinion filed December 3, 1886.]

APPEAL from the Circuit Court of Fulton County; the Hon. JOHN C. BAGBY, Judge, presiding.

Messrs. GRAY & WAGGONER and DANIEL ABBOTT, for appellants.

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Messrs. McKENZIE & CALKINS, for appellee.

PLEASANTS, P. J. This was a claim filed in the County Court and taken by appeal to the Circuit Court, where the claimant obtained a judgment against the executors generally, for \$7,739.60, to be paid in due course of administration.

It was originally filed in the name of Thomas McKee, as administrator of the estate of Kate H. Lee, for the value of certain promissory notes and other property, real and personal, therein mentioned, amounting in all, exclusive of interest claimed, to \$7,659.

Kate H. Lee, who was the wife of appellee and daughter of Catharine Dwire, died in Knox County, December 21, 1876, intestate, without descendant, and leaving an estate of the value of twelve to fifteen thousand dollars, mostly in promissory notes and wholly in personal property, except eighty acres of land in Iowa, and her husband paid her debts.

On the 8th of January, 1877, he and Mrs. Dwire entered into the following agreement:

"Article of agreement between Henry R. Lee, of Galesburg, and Mrs. Catharine Dwire of Canton: It is agreed and fully understood between ourselves, viz.: Mrs. Catharine Dwire and Henry R. Lee, that the property, both real and personal, belonging to Mrs. K. R. Lee, deceased, in her own right, shall be equally divided between Mrs. Catharine Dwire, her mother, and Henry R. Lee, her husband, said division to take place after all her debts are fully paid, including funeral expenses. And it is further agreed, that in case Mrs. Catharine Dwire should die first, her one-half interest shall go to Henry R. Lee; and if Henry R. Lee should die first, then his one-half interest shall go to Mrs. Catharine Dwire. We hereunto set our hands this eighth day of January, 1877.

"HENRY R. LEE.

"CATHARINE DWIRE."

About the middle of February following, they made the division, she taking for her half the land referred to, being the S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ Sec. 21, T. 74, R. 35, in Cass County, Iowa, with the notes and other personal property mentioned

in the claim, filed herein as above stated. He indorsed the notes and executed to her a quit-claim deed of the land for the expressed consideration of \$1,600.

Mrs. Dwire died at her home in Fulton County, April 24, 1879, leaving a will by which she gave all her estate to a sister, a niece and two nephews, and appointed appellants her executors, to whom letters testamentary were issued May 10, 1879.

On March 15, 1880, upon petition of appellee, administration of his wife's estate was granted in Knox County to Thomas McKee. He, after demand of appellants for the property received by their testatrix on the division mentioned, or its proceeds, caused a citation to be issued against them by the County Court of Knox County, under Sec. 81, Ch. 3 of the R. S., and on the hearing obtained an order for the delivery thereof, from which they appealed. Afterward, on April 11, 1881, he filed in the County Court of Fulton County the claim here under consideration. Thereupon it was agreed by the parties that the case should be continued until the final disposition of the one pending in Knox County. That went up by successive appeals, through the Appellate Court, where it was decided in February, 1882, (*Abbot v. The People*, 10 Ill. App. 62,) to the Supreme Court, which disposed of it finally at the March term, 1883 (105 Ill. 588).

The decision was against the administrator. It was held that in this case the husband was entitled under the statute to the whole of his wife's personal estate; that if the administrator got it he would only hold as trustee for him, and that as he had got it directly, without the aid of the administrator, and voluntarily transferred it to Mrs. Dwire, the administrator could have no more right, as against her, than as against him. How he disposed of it, or with what effect, did not concern the administrator. The court recognized the fact that the proceeding was instigated by the husband and for his own sole benefit; that he procured the appointment of McKee for this sole purpose, but held that his actual possession of the property and transfer to Mrs. Dwire cut off all right of the administrator, and that if he was entitled to it again upon her death by virtue of the agreement with her (which the court

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expressly declined to decide either way, as that question was not before it), he must assert it in his own name.

Corrected and enlightened by this decision, appellee caused the active prosecution of the claim in the Fulton County Court to be resumed, and obtained leave to amend it in form by substituting his own name as claimant for that of the administrator. This resumption took place at the August term, 1883, when two or more terms had elapsed after the final decision of the Knox County case, and was pursued to the judgment from which the present appeal was taken.

Appellants say that the agreement for continuance ended when that decision was made, at March term, 1883, and that the Fulton County Court had no power, so late as its August term following, to re-instate and try the case.

Just when the decision of the Supreme Court was made, or the fact came to the knowledge of appellee or his attorney, does not appear, but assuming it was as early as April, or even March, which is not probable, we think there was no such delay as would work a discontinuance or oust the court of jurisdiction of the cause. The claim was filed within two years of issuance of letters testamentary, and notice thereof duly given to appellants. All the parties had been in court and agreed to a continuance for a time that was uncertain, but reasonably sure to be extended over many terms, which entitled appellants to a new notice before the case should be again called up for action. This was given, and the fact that it was not re-docketed at the next term after the decision of the Supreme Court and thereafter regularly continued from term to term by formal order at the instance of the claimant, did not prejudice them. The case was in court and not disposed of. It was competent for appellants to call it up upon notice at any time after said decision, and ask to have it dismissed for want of prosecution, but no such step was taken. The court therefore rightly took action when it did, on the motion of appellee. *Barbaro v. Thurman, adm'r, etc.*, 49 Ill. 283.

It is also urged that if any judgment could have been lawfully rendered for plaintiff, it should have classified the claim, because the statute requires the County Court to classify

claims as they are allowed, and the Circuit Court, on appeal, can render no other judgment than such as the County Court might have rendered. This particular duty is required by the County Court because it directly supervises the administration. The judgment of the Circuit Court allowing the claim and ordering it to be paid in due course of administration, does not deprive the County Court of this supervision. So far, therefor, as it takes the place of the judgment of the County Court, it is the same in form and effect as would have been that of the County Court if it had allowed the claim. The statute still devolves upon that court the duty of supervising the administration, and it will classify the claim as a general judgment of the Circuit Court should be classified.

Lastly, it is contended that the judgment is erroneous, in that it does not order the amount to be paid out of subsequently discovered assets. This is based upon the assumption that the substitution of appellee as claimant was the commencement of the suit as to him, and being made September 18, 1883, was more than two years after the letters testamentary issued to appellant, which presents the main question in the case. There is no room for a doubt that this substitution was asked and allowed as an amendment to the form of an existing suit, and not as the commencement of a new one. By it no new defendant was brought in, no addition made to the items originally charged, nor any change in any of those so charged. The ground of claim, the cause of action, remained exactly as first stated; namely, the appropriation by Mrs. Dwire absolutely to her own use of certain items of property specified and alleged to have belonged to the estate of Mrs. Lee. The object of the suit was not to recover these articles *in specie*, but the value of them in money. It was assumed that the articles themselves not being produced on demand made, had been disposed of by Mrs. Dwire, and could not be so recovered. The account is in form: "To amount of note" (of third party named), "To interest thereon," "To eighty acres of land," "To piano," etc., just as accounts of indebtedness for property usually are, as if it had been sold to her or treated by the claimant as so sold.

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Nor did the amendment change the real claimant. Both the Appellate and Supreme Courts found that fact, and appellants so understood it from the beginning.

It relieved the claimant of none of the burden of proof resting upon the original party, but rather added to it, imposed no new or greater burden upon the defendants, nor cut off any defense they might otherwise have made. Had the suit proceeded in the name of the administrator, as it would if there had been any debts for him to pay or distribution to make, he would have rested upon proof of decedent's possession at the time of her death, of Mrs. Dwire's afterward, and of the value of the property. Under the amended form appellee was required to prove the same facts, and in addition thereto his own sole heirship, the payment of all debts of the estate, and the agreement and division above mentioned. Appellants must have proved the same facts for defense in either case, namely, a valid offset against the estate of Mrs. Lee, or a valid and still operative transfer from the sole heir claiming under her. They could not successfully traverse the *prima facie* case of either claimant, nor avoid it except by proof of one of these facts, and either of them would have been alike available against either claimant.

Thus the object of the suit and the real claimant remained unchanged, and yet the amendment was necessary "to enable the plaintiff to sustain the action for the claim for which it was intended to be brought," in which case the amendment is expressly authorized by Sec. 23 of the Practice Act. Many cases illustrating the application of this provision, and the liberality with which it is construed, are cited in the brief for appellee, but we transcribe only those of *Thomas v. Fame Ins. Co.*, 108 Ill. 91, 100, and *United States Ins. Co. v. Ludwig*, 108 Ill. 514.

The remaining points urged by appellants relate to the facts and the weight of evidence. These were for the court, acting as a jury, to determine. We discover nothing in the record, or wanting to it, to authorize a reversal of the findings.

Judgment affirmed.

City of Quincy v. O'Brien.

CITY OF QUINCY
V.
DANIEL O'BRIEN.

Municipal Corporations—Stock Running at Large, a Nuisance—Power of City of Quincy to Declare—Fines—Statutes—Repeal by Implication—Ordinance.

1. An ordinance of the City of Quincy, declaring the running at large of cattle, horses, mules, goats and sheep within its corporate limits a nuisance, and imposing a fine upon the owner for each violation thereof, is authorized by its charter.

2. This power is not affected by Chap. 8, R. S., entitled "Animals," although a vote taken under the statute in the county in which Quincy is situated, resulted in favor of stock running at large.

3. When a municipal corporation is authorized to impose a fine and no limit is fixed, the fine imposed may exceed that imposed by the State for the same offense.

4. The repeal of a statute by implication is not favored and will not be easily presumed.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. L. H. BERGER, City Attorney, for appellant.

Messrs. SIBLEY & PAPE, for appellee.

WALL, J. The question presented by this record is as to the validity of the ordinance of the City of Quincy which declares the running at large of cattle, horses, mules, goats and sheep, within the corporate limits, a nuisance, and imposes upon the owner a fine of not less than \$5 for each violation of the ordinance.

It is argued on the part of the city that the power to pass the ordinance is derived from the provision of the charter to be found on page 163, P. L., 1857, which confers authority

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“To abate and remove all nuisances and punish the authors thereof by penalties, fines and imprisonment, to define and declare what shall be deemed nuisances and to authorize and direct the summary abatement thereof;” and from the following, found on page 170: “The City Council shall have exclusive power over the streets and alleys, and may abate any and all obstructions and encroachments therein, in such manner as may be provided by ordinance.”

Counsel on the other side insist the ordinance is void because of the passage by the General Assembly of the act known as chapter No. 8 of the Revised Statutes of 1874, entitled “Animals,” and of a vote taken in Adams County pursuant thereto, which resulted in a majority in favor of stock running at large in said county.

The point thus made is that if the city had the power under its charter, originally, to pass the ordinance, the act and vote referred to abrogated it. We think this position is untenable. That the running at large of domestic animals, such as cattle, horses and sheep, within the limits of a city, may well be deemed a nuisance, can not be seriously controverted. The city certainly had the power, under the charter, to pass the ordinance. In the case of *Roberts v. Ogle*, 30 Ill. 459, the Supreme Court held that the City of Carrollton, under a similar provision, might prevent swine from running at large within the corporation. It was there argued, against the power, that it was a common right in this State to allow stock to run at large, and it could not be abridged by such an ordinance; but the court held this right, which was conceded, might be wholly destroyed whenever the Legislature deemed it advisable for the public welfare, and that by the charter the power was clearly granted to the corporation to so restrain stock within its bounds. It had been decided many years before, in the case of *Seely v. Peters*, 5 Gilm. 130, that the common law rule, requiring the owner of stock to restrain it, was not in force in this State, so that such animals might lawfully range at will. The Act of 1874, cited by counsel, provided in the first section that it should be unlawful for certain animals mentioned to run at large except when authorized as

thereinafter provided, and imposed a fine upon the owner for a violation of the act. It also provided, in subsequent sections, that in any county a vote might be taken under certain conditions, and if it resulted in favor of animals running at large, then they might be so permitted. Therefore, in a county where such a vote had been taken with such a result, the situation would be just as it was in the State generally, under the decision in *Seely v. Peters*; and before the passage of the various statutes of which that of 1874 was a revision.

The first general act of this class, so far as we are aware, was passed in 1872. It is not to be supposed the Legislature intended, by this enactment, to interfere with the power of cities to control the subject within their corporate bounds. The provision still remained in the charters unrepealed, and though the construction placed thereon by the courts was known to the law-maker, nothing expressly inconsistent therewith was incorporated in the law. Repeal by implication is not favored, and will not be so easily presumed. The case of *Martin v. People*, 75 Ill. 605, cited by counsel, we think not in point.

It is suggested, also, that this ordinance is void because it imposed a minimum fine higher than that imposed by the statute, and in support of this position we are referred to the case of the *Town of Petersburg v. Metzker*, 21 Ill. 205. That was a case where the act incorporating the town provided that the town should have power to impose fines for the breach of any ordinance, and direct such punishment to be inflicted for any offense against the laws of the corporation as was provided by law for a like offense against the State, and it was held that an ordinance inflicting a minimum fine of \$5 for an assault and battery, when the minimum fine imposed by the State law for the same offense was \$3, was void. There is no such restriction in the charter of Quincy, the only limitation being that fines for violation of ordinances shall not exceed \$100.

It has been repeatedly held, where authority is given to impose a fine for an offense, and no limit is fixed, that the fine may be greater than imposed by the State law for the same

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offense. See *City of Pekin v. Smelzel*, 21 Ill. 464, and cases there cited, also *Baldwin v. Murphy*, 82 Ill. 485.

The ordinance in question imposes a minimum fine of \$5, but fixes no maximum. In such case the maximum of \$100 would be implied, unless the matter is controlled by the terms of ordinance No. 976, which is as follows:

“Whenever in any ordinance the doing of any act or omission of any act or duty is declared to be a breach thereof, and there shall be no fine or penalty declared for such breach, or no maximum or minimum fine or penalty declared for such breach, any person who shall be convicted of any such breach, shall be adjudged to pay a fine of not less than \$3 nor more than \$100.”

What should be the minimum fine is not the point now to be decided, nor has it been discussed. Hence it is not necessary to inquire whether this provision is applicable in the present instance. It is not to be disputed that on the facts in proof the city was entitled to recover, if the ordinance in question is valid. The judgment of the Circuit Court was for the defendant.

Our conclusion is that the ordinance is valid, notwithstanding the objections raised thereto. Therefore, the judgment must be reversed and the cause remanded.

Reversed and remanded.

THE FIRST NATIONAL BANK OF GALESBURG

V.

THOMAS HOVELL ET AL.

Negotiable Instruments—Note—Genuineness of Signature—Witnesses—Competency of.

1. In an action on a promissory note, where the signature is disputed by the defendant, a witness who has never seen the defendant write, but has merely examined certain signatures admitted to be genuine, is incompetent to testify as to the genuineness of the signature in question.

2. Where a witness had no acquaintance with the handwriting of a party

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until a particular signature, purporting to be his, was disputed, the subsequent examination, by him, of the signature to an answer in chancery and to certain other papers that he heard the party state under oath were signed by him, did not render him competent to testify as to the genuineness of the disputed signature.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Fulton County; the Hon. JOHN C. BAGBY, Judge, presiding.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for appellant.

Messrs. GRAY & WAGGONER and BARRERE & GRANT, for appellee.

CONGER, J. This was a suit brought by appellant against appellee and one O. J. Beam, upon a note for \$1,000. Appellee denied his signature to the note and this was the principal question submitted to the jury.

It is urged that the court below erred in admitting improper evidence upon the question of the genuineness of the signature. Oliver Crissy, a witness called for appellee, stated that he had never seen appellee write; that in January or February, 1885, at a time when appellee was disputing signatures, appellee took from his pocket five notes, exhibited them to the witness and others and admitted that the signature to those five notes was genuine, and that this was all the knowledge of appellee's handwriting that the witness had.

Upon this the witness was allowed by the court below to express his opinion as to the genuineness of the signature in dispute. Knowledge thus acquired did not make him competent as a witness upon the subject. *Snyder v. McKeewer*, 10 Ill. App. 188; *Board of Trustees v. Misenheimer*, 78 Ill. 22.

O. H. Bliss, a witness for appellee, stated that he had no recollection of ever seeing appellee write, but that he had examined the signature to an answer in chancery and some other papers that he heard appellee state under oath were signed by him, and from such information expressed his opin-

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ion that the disputed signature was not genuine. It does not clearly appear from the record when he made the examination of these genuine signatures, but we infer it was after the dispute arose, and was done by the witness for the purpose of satisfying his own mind as to the genuineness of the signature in dispute. If we are correct in drawing this conclusion, and his answer will hardly admit of any other, he would clearly be incompetent under the rule in 78 Ill., *supra*. The evidence was conflicting, and we can not know how far the statement of these two witnesses may have influenced the finding of the jury and therefore think the question should be submitted to another jury upon such evidence only as under the rules of law is competent.

Reversed and remanded.

BLANDFORD, FOWLER & COMPANY
V.
WING FLOUR MILL COMPANY.

Commission Merchants—Local Usage and Custom—Consignment of Unsound Flour—Advances—Suit to Recover Difference.

1. Where produce is shipped to commission merchants to be sold in their market, there is an implied understanding that the business shall be done according to the local usage and custom.

2. A commission merchant, who has made advances on flour consigned to him on the presumption that it was sound, may protect himself by selling it at the best advantage when it has been found to be unsound, if the consignor fails to secure him against loss. He may also recover from the consignor the difference between the amount realized and the amount advanced by him.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Coles County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. JOHN FAVORITE and S. M. LERTON, for appellants.

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A person who deals in a particular market must be taken to deal according to the known, general and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market, must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not. Story on Agency, Secs. 60, 96, 199; *Bailey v. Bensley*, 87 Ill. 556; *Lyon v. Culbertson*, 83 Ill. 33; *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549.

Where the consignment is made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the re-imbursement of such advances or liabilities.

This has long been the settled doctrine in the American and English courts. It is the settled doctrine in the courts of our own State, as evidenced and shown by numerous decisions bearing upon shipping and trading interests, and must, as we take it, bind this case. *Winne v. Hammond*, 37 Ill. 99; *Lewis v. G. & C. U. R. R. Co.*, 40 Ill. 281; *Peters v. Elliot*, 78 Ill. 321; *Nelson v. C., B. & Q. R. R. Co.*, 2 Ill. App. 180.

Messrs. WILEY & NEAL, for appellee.

WALL, J. Appellants are commission merchants doing business in Baltimore, Maryland. They received two consignments of flour from appellee, the manufacturer, of Charleston, Illinois. The appellee drew upon appellants for the

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supposed value of each consignment, the two drafts aggregating \$1,100.75, both of which were paid by the appellants.

These consignments were to be sold by the appellants in the Baltimore market for account of the appellee. Each lot was inspected on its arrival by a bonded inspector of the local corn and flour exchange and found unsound.

It was, therefore, not branded and could not be disposed of at the current rates for flour that had passed inspection. Appellee was notified of the facts, and requested a sample of each lot, which was sent, and after some three weeks, during which time there was considerable correspondence between the parties, the flour was sold by appellants at the best rate obtainable, and this action was to recover the difference between the sum so realized and the amount paid on appellee's drafts.

A trial by jury resulted in a verdict for the defendant below, and the only point now made is that the court erred in refusing to set aside the verdict. There is substantially no conflict in the evidence as to the facts as above stated; and the only question about which there can be any serious doubt is as to the condition of the flour when it was shipped. It is true the evidence offered by the appellee tended to show that the samples returned were not unsound, or, at least, that one of them was not, it being admitted the other had a bad smell as though affected by oil or some other foreign substance. There is no doubt, however, that it did not pass inspection and that, therefore, it would not sell at regular quotations in the Baltimore market. There is no evidence from which any want of good faith or diligence on the part of appellants can reasonably be inferred.

When the flour was sent to the appellants, for sale in the market, it was with the implied understanding that the business should be done according to the local usage and custom. *Bailey v. Bensley*, 87 Ill. 556; *Story on Agency*, Sec. 96.

We find nothing in the record to excuse the appellee for not making good the loss. Appellants had advanced their money upon the presumption the flour was marketable, and they had the right to protect themselves by selling to the best

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advantage and might then call upon appellee for the difference, if any. It was only after repeated requests upon appellee to secure them against loss and after fair warning that they resorted to this course.

It may be that the Baltimore market was at that time very exacting, and that in other markets the flour might have sold much better, but this was not the fault of appellants.

Upon the undisputed facts in the case we think the plaintiffs below were entitled to recover and that the court erred in refusing to set aside the verdict. The judgment is reversed and the cause remanded.

Reversed and remanded.

GEORGE H. PROCTOR AND FRANK LOHMAN, JR.

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Dram Shops—Sale of Liquor to Minor—Action to Recover a Fine—Whether a Civil Action—Instruction.

1. A suit before a Justice of the Peace under Sec. 12 of the Dram Shop Act, to recover a fine for selling liquor to a minor, is a civil action and not a criminal prosecution.

2. Upon appeal in such an action the Circuit Court may instruct the jury that a clear preponderance of evidence is sufficient to authorize a recovery by the people.

[Opinion filed February 17, 1887.]

IN ERROR to the Circuit Court of Cass County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. LEEPER & THATCHER, for plaintiffs in error.

Messrs. R. R. HEWITT, State's Attorney, and GEORGE L. WARLOW, for appellees.

CONGER, J. This was a prosecution originally commenced

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before a Justice of the Peace, to recover a fine for selling intoxicating liquor to a minor, under the provisions of the Dram Shop Act.

The suit was based upon the 12th section of said act, which is as follows: "Any fine or imprisonment mentioned in this act may be enforced by indictment in any court of record having criminal jurisdiction, or the fine above *may be sued for and recovered* before any Justice of the Peace of the proper county, in the name of the people of the State of Illinois, and in case of conviction the offender shall stand committed to the county jail until the judgment and costs are fully paid."

Upon the trial in the Circuit Court, upon the appeal of appellants, the Circuit Court instructed the jury that "a clear preponderance of the evidence was sufficient to authorize the people to recover," and this presents the only question in the case which we deem it necessary to notice.

Appellants insist this instruction was erroneous; that the case was in fact, as well as in theory, a criminal prosecution, and therefore they were entitled to have the jury instructed that the offense charged against them should be proven beyond a reasonable doubt.

The distinction between a criminal prosecution and a civil action to recover a penalty is not always clear nor easily defined, nor is there any general rule by which it can in all cases be determined under which class a particular case falls.

In *Ferguson v. The People*, 73 Ill. 559, it was held, under the 9th section of the Act of the 13th of January, 1872, that prosecutions before a Justice of the Peace under that section were not criminal.

That section was as follows: "The penalty and imprisonment mentioned in the sixth section of this act may be enforced by indictment in any court of record having criminal jurisdiction, and all pecuniary fines or penalties provided for in any of the sections of this act (except the 4th and 5th) *may be enforced and prosecuted for* before any Justice of the Peace of the proper county, *in an action of debt*, in the name of the people of the State of Illinois, as plaintiff, and in case of conviction the offender shall stand committed to the common jail

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until the judgment and costs are fully paid." * * * It will be noticed that the principal difference in the language of this section and the present law is, the words, "in an action of debt," are omitted from the present law, and the words, "may be sued for and recovered," are substituted in the present law for the words, "may be enforced and prosecuted for," in the Act of 1872.

Appellants insist that the Legislature, by the omission of the words, "in an action of debt," from the present law, intended to make all suits before a Justice of the Peace for the penalty a criminal prosecution.

If this were the only charge made there would be force in the suggestion, but when the words, "may be enforced and prosecuted for," are omitted and their place is supplied with the significant expression, "may be sued for and recovered," we think the Legislature meant to declare that the fines and penalties to be recovered before a Justice of the Peace under the section under consideration were to be so recovered by a civil action, and not by a criminal prosecution, and hence the expression, "in an action of debt," was no longer required to make the meaning clear, and was omitted in the revision.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

ROBERT FISHER

V.

A. J. HAM.

24	601
66	460

Negotiable Instruments—Action on Note—Execution—Evidence—Instructions—Practice.

1. In an action on a promissory note, it is *held*: That the evidence sustains the verdict, and that there was no error in giving and refusing instructions.

2. This court may decline to consider whether the court below improperly refused instructions asked, where the abstract does not contain those given.

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[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Champaign County; the Hon. JAMES F. HUGHES, Judge, presiding.

Messrs. J. S. WOLF and M. W. MATHEWS, for appellant.

Messrs. J. L. RAY and F. M. WRIGHT, for appellee.

WALL, J. The substantial issue in this case was whether the appellant executed the note sued on, and the point mainly pressed upon our consideration is that the evidence did not support the verdict.

We have carefully read the evidence as it appears in the record, and find it fully sustains the conclusion of the jury. We can not interfere on this ground. Appellant complains of the refusal to give certain instructions. The abstract does not contain the instructions which were given, and for this reason we might well decline to consider the point, but on referring to the record, we think there is no occasion for the complaint. Two of the instructions so refused, so far as they were important, were sufficiently embraced in those that were given. The third was refused no doubt because there was no evidence upon which to base it. The main and indeed the only issue of fact before the jury was as to the execution of the note. Of course, if the note was paid or settled, there could be no recovery upon it, and this is a proposition no jury would need instruction upon; but we can not say there was such evidence as made it the duty of the court to call attention to the point. It would be unduly technical to reverse the case on this ground alone. We are satisfied that upon the merits the judgment is right, and that it should be affirmed.

Judgment affirmed.

WILLIAM BUCKWORTH
V.
AMANDA A. CRAWFORD.

24 603
52 598

Dram Shops—Suit under Sec. 9, Ch. 43, R. S.—Parties—Amendment after Verdict—Evidence—Sufficiency of—Discretion.

1. In suits under Sec. 9 of the Dram Shop Act the plaintiff may proceed against any and all persons jointly or severally who may have caused the intoxication in whole or in part, without reference to whether they have equally contributed to the injuries complained of. They stand upon the same footing as persons engaged in a joint tort, each being liable for the entire damage.

2. Upon a motion for a new trial in such an action the court may enter judgment against one defendant after permitting the plaintiff to dismiss as to another.

[[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

MESSRS. TIPTON & BEAVER, for appellant.

MESSRS. JOHN T. LILLARD and FRANK R. HENDERSON, for appellee.

WALL, J. This was an action on the case under Sec. 9, Ch. 43, entitled Dram Shops, against appellant and one David Martin. The appellee in her declaration charged that the defendants furnished intoxicating liquors to her husband, whereby he became habitually intoxicated, and that by reason of his condition thus produced he squandered his property and neglected his business, thereby injuring her in her means of support, and that while so intoxicated he assaulted her and drove her from home, thereby injuring her in health.

The case was tried by a jury. There was a verdict for plaintiff for \$350. Upon a motion being made for new trial

Buckworth v. Crawford.

the plaintiff by leave of the court dismissed the case as to defendant Martin, and the court overruling the motion for a new trial, rendered judgment against appellant for the amount of the verdict. It is urged that it was error to permit the plaintiff to dismiss as to one defendant of the verdict, without dismissing as to the other.

The Practice Act, Sec. 24, Ch. 110, expressly authorizes this to be done. In the case of *Cogshall v. Beesley*, 76 Ill. 445, the plaintiff recovered a verdict in an action of assumpsit against two defendants, and upon a motion for new trial being made, was permitted to discontinue as to one of them and take judgment on the verdict against the other. The Supreme Court held this in accordance with the statute referred to.

In suits to recover under Sec. 9 of the Dram Shop Statute the plaintiff may proceed against any and all persons jointly or severally, who may have caused the intoxication in whole or in part, and in such cases it is not important that the several defendants have contributed in the same proportion to the injuries complained of, and they stand upon the like footing as persons who are engaged in a joint tort, each being subject to liability for the whole damage. Hence, when the court can see that there is a clear case against one of such defendants and the verdict is not in any wise excessive or unwarranted by the proof, it would be justified in granting permission to amend as to parties, under Sec. 24, Ch. 110, above referred to.

To a great extent, if not wholly, this is a matter within the discretion of the court—its sound legal discretion—and its action should not be interfered with by an appellate tribunal, unless it is apparent this discretion has been abused and injustice thereby occasioned. We think there is no such abuse disclosed here. It is next urged that the evidence did not sustain the verdict. After an examination of the abstract we feel compelled to disagree with this position of counsel. It is satisfactorily shown by the proof that the husband, who was at one time quite prosperous, acquired settled habits of intoxication, squandered and wasted his estate, neglected his business and mistreated the plaintiff, his wife, so that she was compelled to leave home on several occasions.

McIntyre v. Sholty.

One of these times she went away bareheaded, when the weather was severe, causing her to take cold and resulting, as she says, in the loss of an eye. The misconduct of the husband finally caused a separation. No one can read the testimony without coming to the conclusion that if her story is true, and it is somewhat corroborated, she has suffered grievously, and that the verdict is an exceedingly moderate allowance for the damages she has sustained.

Whether the appellant furnished any considerable amount of the liquor which produced these misfortunes was a question for the jury to determine.

While there was some conflict in the evidence, we are satisfied with the conclusion arrived at in this respect. It is quite evident that a large part of the liquor consumed by the husband was obtained from appellant after he had been requested by appellee to let him have no more. The judgment will be affirmed.

Judgment affirmed.

24 605
139 171

ROBERT S. MCINTYRE, ADMINISTRATOR,

V.

LEVI SHOLTY, ADMINISTRATOR.

Lunatics—Liability for Torts—Evidence.

1. A lunatic is liable in a civil action for a tort committed by him.
2. In an action to recover damages for the wrongful burning of the plaintiff's barn by the defendant's intestate, it is *held*: That the court below properly refused to permit the defendant to prove that the deceased was a lunatic; and that the evidence sustains the verdict for the plaintiff.

[Opinion filed February 17, 1887.]

IN ERROR to the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. BLADES & NEVILLE, for plaintiff in error.

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The will or volition we are concerned about here, is the power to control and direct the intellectual faculties of the mind. In the insane this is lost.

If the brain is diseased so that the individual has no volition, how, on principle, is the case to be distinguished from that of pure accident, or that resulting from merely physical, and even inanimate causes? "For a purely accidental occurrence causing damage without the fault of the person to whom it is attributable no action will lie; for though there is damage, the thing amiss—the *injuria*—is wanting." Cooley on Torts, 80, and cases cited; note to Vincent v. Stinehour, 29 Am. Dec. 146.

If one is driving his domestic animals along the public highway he is bound to observe due care, and if, notwithstanding he is guilty of no negligence, they escape from him and go upon private ground, he is not responsible, provided he removes them within a reasonable time. Cooley on Torts, 341, citing, Goodwin v. Chevely, 4 Hurl. & N. 631.

Messrs. KERRICK, LUCAS & SPENCER and TIPTON & BEAVER, for defendant in error.

The rule is, that lunatics are liable civilly for all torts or wrong committed by them. To that rule there is only one exception that we know of, and that is, a lunatic is not liable for slanderous words uttered by him while totally deranged. Bryant v. Jackson, 6 Humph. 199. The following authorities declare the general rule: Weaver v. Ward, Hob. 134; Cross v. Andrews, Cro. Eliz. 622; Cross v. Kent, 32 Md. 531; Kron v. Schoonmaker, 3 Barb. 649; Williams v. Cameron, 26 Barb. 172; Hartfield v. Roper, 21 Wend. 615; Morse v. Crawford, 17 Vt. 499; S. C. Ewell's Leading Cases, 635; 2 Saunder's Pl. & Ev. 318, 1163; 1 Chit. Pl. 76; Shearman and Redfield on Neg., Sec. 51, 57; Broom Com. 684, 857; Bush v. Pettibone, 4 N. Y. 300; Brens v. McKinsey, 23 Iowa, 343; Lancaster County Bank v. Moore, 78 Pa. St. 407, 412; *Ex parte* Leighton, 14 Mass. 207; Cooley on Torts, 99.

CONGER, J. This was a suit brought by defendant in error

McIntyre v. Sholty.

against plaintiff in error, for the wrongful burning of defendant in error's barn, by Benjamin D. Sholty, plaintiff in error's intestate, and judgment was rendered for \$2,200 and costs.

There are two points urged as a ground for reversing the judgment of the court below. First, that the court erred in refusing to permit plaintiff in error to prove that said Benjamin D. Sholty was insane at the time of the alleged burning, and secondly, the insufficiency of the evidence to show that he set fire to the barn.

We think the Circuit Court was right in excluding the proposed evidence. That a lunatic is liable for torts committed by him is well settled. In 1 Chitty's Pl., 76, it is said:

"Although a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit."

The reason of the rule is very clearly stated by Cooley, as follows: "Undoubtedly there is some appearance of hardship, even of injustice, in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the insufferable calamity of mental obscurity, an obligation to observe the same care and caution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy, and it is to be disposed of as would be the question, whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent and at the same time prompts him to commit injury, there seems to be no greater reason for imposing upon the neighbors or the public, one set of these consequences rather than the other—no more propriety or justice in making them bear the losses resulting from his unreasoning theory, when it is upon them or their property, than there would be in calling upon them to pay the expenses of his confinement in an asylum, when his own estate is ample for the purpose.

"All questions of public policy must be settled on a consideration of what, on the whole, is the rule that will best subserve

McIntyre v. Sholty.

the general welfare. Among the considerations bearing on the proper rule in the case of an offending person are such as relate to the appointment of a committee or guardian, empowered by law to take charge of him, and restrain his action so as to prevent injury to himself or others. The appointment of this custodian is properly attended to by relatives or friends, those who have a personal or family interest in him, or who might be entitled to succeed to his estate if it were preserved. Would it not be an important stimulus to their action if the estate is to be held responsible for all injuries committed by him to others, and would it not tend to indifference on their part if the law were to leave the injured party to bear the loss without redress?

“Unless these questions can be answered in the negative, the reasons for holding his own estate responsible seem conclusive.

“Another immediate consideration is derived from the fact that the distinction between insanity and the cunning of malice is not always sufficiently clear for ready detection; and a rule of irresponsibility in respect to such persons would be likely to result in similar difficulties in civil cases, to those which have brought the administration of criminal law into disrepute wherever the plea of insanity is interposed. Nothing could present to the depraved mind a stronger temptation to simulate insanity for the purpose of mischief and revenge, than a rule of law which would give full immunity in case the deception proved successful, etc.” Cooley on Torts, pp. 100, 101. To the same effect see *Ex parte Leighton*, 14 Mass. 207; *Kron v. Schoonmaker*, 3 Barb. 649; Shearman and Redfield on Neg. Secs. 51, 57; *Morse v. Crawford*, 17 Vt. 499.

As to the second objection, we think it is not well taken. We have carefully examined the evidence, and think the jury were fully warranted in reaching the conclusion they did. The judgment will be affirmed.

Judgment affirmed.

The People v. Hamilton.

THE PEOPLE OF THE STATE OF ILLINOIS
V.
SAMUEL HAMILTON AND CHARLES W. GROGAN.

24 609
54 358

Quo Warranto—Discretion—Village Trustees—Qualifications—Taxes—Arrears—Paragraphs 34 and 192, Chap. 24, Starr & C. Ill. Stat.

1 It seems that the provisions of paragraph 34, Chap. 24, Starr & C. Ill. Stat., touching the qualifications of Aldermen, are not made applicable to Village Trustees by paragraph 192 of said chapter.

2. Upon a proceeding by information in the nature of a *quo warranto* to test the right of the defendants to hold the office of Village Trustees, it is held: That disqualification arising from being in arrears in the payment of taxes as provided in said paragraph 34, if applicable, applies to the office and not to the election; that payment of the tax by one of the defendants, before assuming the office, removed the objection; and that the other defendant was not in arrears within the meaning of the statute, his arrears being caused by the fault of the collector of taxes.

3. In a proceeding by *quo warranto*, the issue of a writ does not end the discretion of the court. Where the writ has been improvidently issued the court may decline to proceed or to grant the relief sought.

[Opinion filed February 17, 1887.]

IN ERROR to the Circuit Court of Cass County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. OSCAR A. DE LEUW, for plaintiffs in error.

Messrs. ROACH & JONES and BEACH & HODNETT, for defendants in error.

The granting of leave to file an information in the nature of a *quo warranto* is within the sound discretion of the court. The People v. Waite, 70 Ill. 25; The People v. Moore, 73 Ill. 132; The People v. North Chicago Railway Co., 88 Ill. 537.

The issue of the writ does not end the discretion of the court. Commonwealth v. Chuley, 56 Pa. St. 270.

The City Council is the judge of the election and qualifications of its own members. Starr & C. Ill. Stat., Vol. 1, Sec.

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35, p. 458; People v. Metzger, 47 Cal. 524; Duffield's Case, 20 Leg. Int. 100; Brightly's Lead. Cases on Elections, 651; Commonwealth v. Garrigues, 28 Pa. St. 9; Commonwealth v. Leech, 44 Pa. St. 332.

A disqualification existing at the time of election, but removed at the time of entering upon the duties of the office, is not cause for removal from office. State v. Murray, 28 Wis. 96; State v. Trumpf, 50 Wis. 103; Privett v. Beckford, 26 Kan. 52.

WALL, J. This was a proceeding by information in the nature of a *quo warranto* to test the right of Samuel L. Hamilton and Charles W. Grogan to hold, respectively, the office of Trustee of the Village of Ashland, in the County of Cass. A demurrer was interposed to the joint pleas of the defendants and was by the court overruled. The plaintiffs electing to abide by the demurrer, judgment was entered for the defendants. The record is brought here by writ of error and the ruling of the court upon the demurrer is now to be considered.

The said Hamilton and Grogan were elected Trustees of said village on the 20th of April, 1886, and on the 6th day of May following took the proper oath and entered upon the duties of the office. The only objection to the right of Hamilton to hold the position is that at the time he was elected he owed the sum of \$1.44 for village tax, which sum was then unpaid and standing against him upon the books in the hands of the Sheriff as tax collector of the county, which sum was by said Hamilton paid on the first day of May, after his election, and before his assumption of the office.

As to Grogan the objection is that he owed the sum of 44 cents for the same tax, which was paid on the 18th of June, 1886, before the filing of the information and after he had entered upon the office. It is alleged in the plea that prior to said election said Grogan wrote to the Sheriff, requesting him to send him, said Grogan, a statement of the amount of his taxes; that the Sheriff sent him a statement which did not include said 44 cents for tax on personal property; that he paid the amount so stated by the Sheriff before the election; that

The People v. Hamilton.

he did not know the amount of said personal tax then, nor until after he was elected, but would have paid it with the realty tax had he known what it was.

Plaintiffs in error contend that Hamilton and Grogan were disqualified to hold the office and rely upon the provisions of paragraphs 34 and 192 of Chap. 24, R. S. Paragraph 34 declares that "no person shall be eligible to the office of Alderman unless * * * nor shall be eligible if he is in arrears in the payment of any tax or liability due the city." * * * Paragraph 192, relating to villages, provides for the election and powers of Trustees, and after declaring that the village corporation shall have the powers in said act conferred upon cities of 5,000 inhabitants, except as therein otherwise expressly provided, concludes in these words: "And wherever the words 'City Council' or 'Mayor' occur in this act, the same shall be held to apply to the Trustees and President of such village, so far as the same may be applicable."

It may be well doubted whether this clause has the effect and meaning contended for. The paragraph 192 is devoted to the matter of providing for the creation of the office of Trustee, stating the powers and duties attached thereto and the functions of the village corporation. In thus providing for the creation and powers of the corporation, it is declared that the words "City Council" and "Mayor," wherever occurring, shall be held to apply to the Trustees and President.

From the connection it would seem naturally that the only purpose was to confer power, and state or limit the same, upon the corporate officials named. Had it been designed to fix or prescribe the qualifications of the persons who were to hold the offices, different and more appropriate terms would have been employed. It would be a strained and unnatural construction to give this provision the force and effect suggested by counsel, and when the result would be to impose a restriction upon the right of the people to select and of the citizen to serve, we are very strongly inclined to hold otherwise.

But admitting, for the sake of argument, that the construction contended for is sound, we think the ruling of the Circuit Court may be sustained upon other grounds. Hamilton paid

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his tax before he assumed the office. The provision of paragraph 34 is that no person shall be eligible to the office who is in arrears, etc.

Webster, in defining the term eligible, says: "Legally qualified—as eligible to office." The provision here is with regard to eligibility to office. In the case of *State v. Murray*, 28 Wis. 96, this distinction is recognized, the court observing that "the term 'ineligible' means as well a disqualification to hold an office as disqualification to be elected to an office." In that case the point presented was whether one who was an alien, when elected Sheriff, could, by removing the disqualification before the term began, fit himself to hold the office. It was decided he could.

There was no provision of statute or constitution on the subject, but it had been held to be the law of the State that none but electors could hold office, and it was, in the case cited, declared that this disqualification related merely to the holding of the office and not to the election. The doctrine was adhered to in *State v. Trumpf*, 50 Wis. 103; *McCrary on Elections*, 2d Ed. 232; *Privett v. Beckford*, 26 Kan. 52. Referring again to paragraph 34, it will be seen that this distinction seems to have been in view when the paragraph was drawn. It provides that "no person shall be eligible to the office of Alderman unless he is a qualified elector and resident in the ward for which he is elected, nor shall he be eligible if in arrears for any tax or other liability * * * nor if he shall have been convicted of malfeasance, etc.; nor shall he be eligible to any office, the salary of which is payable out of the city treasury, if, at the time of his appointment, he shall be a member of the City Council."

We are satisfied that if the paragraph is applicable to the case of Village Trustees the disqualification is as to the office and not the election—that the payment of the tax before assuming the office met the requirement of the law and therefore that as to Hamilton the plea disclosed a perfect defense. As to Grogan it may be said that according to the true interest and spirit of the law he was not in arrears.

The object of the provision was to exclude those who were

really and substantially debtors to the corporation, it being supposed that such persons could not safely be trusted to administer the municipal affairs. It would be unwise and dangerous to public interests that those who are indebted to the city should control its finances, and this would be especially so in large cities where the transactions are numerous and important and where the details of public affairs are not so well understood by the people generally as in smaller corporations. This was the evil sought to be avoided. It was never intended that the accidental omission to pay the trifling sum of less than a half dollar, where there had been an honest intent and effort to pay all that was due, should exclude a citizen who was the choice of the people from holding the position to which he was elected. Such a case is not within the spirit and hardly within the letter of the law.

Grogan had requested a statement of his taxes from the proper officer who was charged with the collection thereof. The statement was furnished and the sum called for was paid. The amount omitted would have been paid if included in the statement.

That it was not, was through the fault of the officer and not of the taxpayer, and while this did not release the tax, there was no such arrearage as was meant by the provision in question.

It is suggested that the maxim "*de minimis non curat lex*" is applicable. It is familiar that in proceedings by *quo warranto* the court may, in the exercise of a sound legal discretion, refuse leave to file the information. *People v. Waite* 70 Ill. 25; *People v. Moore*, 73 Ill. 132; *People v. N. Chi. Ry. Co.*, 88 Ill. 537; *Dillon on Municipal Corp.*, Vol. 2, Sec. 722.

Had the facts disclosed by this plea appeared upon the face of the information the court would have been justified in refusing permission to file it. When it appears that the writ was improvidently issued the court may well decline to grant the relief sought.

The issue of the writ does not end the discretion of the court and if the case made by the pleadings is such that leave

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to file would have been refused in the first instance the court may decline proceeding to judgment. Commonwealth v. Cheely, 56 Pa. St. 270.

In the view we have taken it is not deemed necessary to consider the point made by defendants in error, that as the Board of Trustees may judge of the election and qualification of its own members, the remedy by *quo warranto* is abrogated.

The Supreme Court intimated adversely to this position in Linegar v. Rittenhouse, 94 Ill. 208, and so it has been recently decided by the Appellate Court of the Fourth District in the case of People ex rel., etc., v. Bird, 20 Ill. App. 568.

Upon the whole case we are satisfied with the ruling of the Circuit Court and the judgment will therefore be affirmed.

Judgment affirmed.

DANIEL DOYLE ET AL., IMP'D, ETC.

V.

SHERMAN E. BAUGHMAN.

Drainage—Power of Commissioners to Change District Boundaries—Petition—Additional Signatures—Final Order—Defect—Act of 1885—Retrospective Effect of—Trespass—De Facto Officers—Contractors—Damages—Presumption—Res Adjudicata.

1. It is within the power of the commissioners to change the boundaries of a drainage district so as to exclude lands already included or to include additional lands. They may also permit additional signatures to the petition.

2. In an action of trespass against certain drainage commissioners and contractors, it is *held*: That a defect in the final order organizing the district was cured by the Act of 1885; that the commissioners were such *de facto* officers as to afford protection to the contractors and their employes; that it must be presumed that the plaintiff's entire damages, "consequent upon the construction of the proposed work," were considered by the jury in the condemnation proceedings; and that the verdict for the plaintiff is against the law and evidence.

3. Where a proceeding under a statute is defective in some particular which the Legislature might have dispensed with, it may be dispensed with by a subsequent act operating retrospectively.

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[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Christian County; the Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. ANTHONY THORNTON and JAMES M. TAYLOR, for appellants.

Mr. JOHN G. DRENNAN, for appellee.

The drainage district was not legally organized, and this being an action of trespass against appellants as individuals the appellee had the right to attack the organization of the drainage district, when set up in justification of the acts of appellants, and such attack is not collateral. *Blake v. The People*, 109 Ill. 504, 517; *Stowe v. Flagg*, 72 Ill. 397; *Biglow v. Gregory*, 73 Ill. 197.

WALL, J. This was an action of trespass *quare clausum fregit*, by the appellee against the appellants; verdict and judgment for plaintiff below for \$395.83.

Three of the appellants, Doyle, Vermillion and Salliday, were Highway Commissioners of Stonington Township, and by operation of law, drainage commissioners of the town.

They assumed to organize a drainage district, and made a contract under which certain ditches were constructed on the lands of the appellee. The other appellants were the contractors and their employes in doing the work.

The entry upon the land and the making of the ditches were the trespasses complained of. The appellants justified under the right of the drainage commissioners to cause said ditches to be constructed. Whether the organization of the drainage district was legally effected, was one of the questions made on the trial and controverted here. The only objection urged is that the district, as finally organized, comprised forty acres of land not embraced in the original petition and other proceedings.

It is within the power of the commissioners to change the boundaries, so as to exclude or include lands, and they may

Doyle v. Baughman.

“permit additional signatures to be made to the petition by any adult person owning land in, or owning land desired to be taken in the proposed district, to the end that a majority of the adult owners of land in the district as finally to be organized, and who shall be owners in the aggregate of more than one-third of such land, shall have signed the petition, which facts said commissioners shall find and shall put such finding in writing.” The final order of the commissioners organizing the district did not find that the district, as so organized, including this forty-acre tract, had been petitioned for by a majority of the adult owners, and owners of more than one-third of the lands therein, but such was the finding in the order made at the first meeting, and in the final order the map or plat showing the boundaries of the district and the lands included therein, was referred to as filed therewith. Turning to this map and comparing it with the petition, it readily appears that these statutory requirements, as to ownership in the petitioners, were abundantly complied with, and that the failure to set out the finding to that effect was probably the result of more inadvertence.

Without discussing or deciding the question whether this omission would divest the commissioners of the defense which their official character of drainage commissioners would give them when called to account for their own acts, we think it is clear they were such *de facto* officers as that protection would be afforded to the contractors and their employes for any act properly performed by their direction, and that as to these the organization of the district must be regarded sufficient and legal. The proper proceedings had been instituted and there was jurisdiction to act therein. The only complaint is of an irregularity in the final order. As to the public and the rights of third persons there was a *de facto* organization at least. *Blake v. People*, 109 Ill. 504, and the authorities there cited. Whether the organization is so faulty as not to afford protection to the appellants Doyle, Vermillion and Salliday, who aver that by reason of their proceedings in such organization they clothed themselves with an official character, need not be determined, in view of the curative statute of 1885.

This act in unequivocal terms declares that all drainage districts heretofore organized under any one or more of the acts hereby repealed (1879, 1881, 1883) shall be held, and are hereby declared to be legally organized and the assessments made therein shall be held legally made.

The validity of this act is not to be settled in this court, but there seems to be no reasonable ground to call it in question. Where the thing which failed to be done and which constitutes the defect in the proceeding is something which the Legislature might have dispensed with the necessity of, by a prior statute, then a subsequent act dispensing with it retrospectively must be held valid. Cooley on Const. Lim. 371; Blake v. The People, etc., *supra*; and such curative legislation may be efficient, though "passed after the litigation began." Cowgill v. Long, 15 Ill. 202. The organization of the drainage district may, therefore, be regarded as legal so far as it is concerned in the present inquiry.

It appears from the record that the most important and substantial ground of complaint by the plaintiff below was that the dirt taken out of the ditches was left upon the land along, and twelve feet distant from the ditches on either side, in irregular piles, thereby interfering with the cultivation of the land not occupied by the ditches.

The drainage commissioners were not able to obtain the release of the appellee and proceeded under the statute to condemn the right of way and assess the damages of the appellee in the premises. A trial was had and a finding by jury, which remains unreversed and in force, that those damages were \$138. There was upon the trial of the present case a contention by the appellee that such assessment did not cover his damages in the respect named for so leaving the dirt upon his land, but that it included merely the right of way and other damages.

Under the statute in question it is provided that upon such assessment of damages "the jury shall hear the evidence offered in the case as to the value of the land proposed to be taken and all damages consequent upon the construction of the proposed work."

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Of course the only part actually taken is what is covered by or included in the ditch but "the damages consequent upon the construction of the proposed work" might well embrace such as those complained of. It appears very plainly that to properly construct the ditch the course pursued here was necessary and that such is the result, and uniform if not the universal, practice in such works. It appears also that it was so contemplated in this instance from the form of release which was sought to have executed by appellee and which was before the jury on the trial of the condemnation case.

Whatever was proper for the jury to take into account as a part of the damages consequent upon the construction of the proposed work it must be presumed, was considered by them on such assessment and such an item can not be the subject of another claim for damages. The matter is *res judicata*. Freeman on Judgments, 272.

We think there can be no reasonable doubt that this item was within the scope and range of the investigation upon the assessment of damages. The organization of the district being deemed regular for present purposes the only important question of fact to be determined by the jury, was whether the damages now complained of were "such as were consequent upon the construction of the proposed work." If they were, then it is a presumption of law, which the jury were not at liberty to disregard, that these damages were included in the assessment referred to and could not, therefore, form the basis of an allowance in the case at bar.

The instructions given by the court are complained of by the appellants and so far as they are not in harmony with the views here suggested we deem them erroneous.

The verdict is manifestly against the law and evidence, and should have been set aside. It is not necessary to consider the instructions in detail as what has been said will sufficiently indicate the course to be taken on another trial in this respect. The judgment is reversed and the cause remanded.

Reversed and remanded.

THE CHICAGO & ALTON RAILROAD COMPANY

v.

JOSEPH I. HILL.

Railroads—Injury to Animal, Unlawfully at Large—Liability.

A railroad company is liable for killing an animal, although it was unlawfully at large and upon the defendant's track, if by the exercise of proper care and prudence, after the discovery of the animal, its engineer might have prevented the injury.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Green County; the Hon. GEORGE A. HERDMAN, Judge, presiding.

Messrs. PATTERSON & STARKEY, for appellant.

The only theory by which the appellee could expect to recover in this case was the gross negligence of the defendant's servants, as he concedes that the cow was running at large in violation of law. The following are some of the leading cases which, in our judgment, are similar to the case at bar: C., B. & Q. R. R. v. Bradfield, 63 Ill. 220; T. H. & I. R. R. Co. v. Jenuine, 16 Ill. App. 209; R., R. I. & St. L. R. R. Co. v. D. O. Linn, 67 Ill. 109; P., P. & J. R. R. Co. v. Champ, 75 Ill. 577; T., W. & W. R. R. Co. v. Barlow, 71 Ill. 640; I. C. R. R. Co. v. John S. Bull, 72 Ill. 537.

Mr. DAVID F. KING, for appellee.

Even if plaintiff was guilty of contributory negligence, this fact did not relieve the company from the duty to exercise proper care, and observe all reasonable precautions to avoid the accident. P., P. & J. R. R. Co. v. Champ, 75 Ill. 577.

The cases cited by appellant are not similar to case at bar, as in those cases the engineer saw the stock grazing near the track, but in this case engineer saw cow was frightened and chased her down the track. For similar cases see T., W. & W. Ry.

C. & A. R. R. Co. v. Hill.

Co. v. Barlow, 71 Ill. 640; I. C. R. R. Co. v. Middlesworth, 46 Ill. 494; R., R. I. & St. L. Ry. Co. v. Rafferty, 73 Ill. 58; C. & A. R. R. Co. v. Engle, 84 Ill. 397; C. & St. L. R. R. Co. v. Woosley, 85 Ill. 370; Ewing v. C. & A. R. R. Co., 72 Ill. 25; C., B. & Q. R. R. Co. v. Cauffman, 38 Ill. 424.

CONGER, J. This was a suit against the railroad company to recover the value of a cow killed by one of the company's trains within the corporate limits of Roodhouse. Appellee recovered in the court below, and appellant asks a reversal of the judgment, on the ground, principally, that the verdict of the jury is not sustained by the evidence.

The evidence shows that on the 15th of October, 1885, appellee's cow was grazing on the west side of the railroad track at a point some 150 feet north of a public crossing, upon which she was afterward struck and killed. From the point where the cow was grazing, south to the crossing, there was a fence twenty-nine feet west of the track, and extending south about 130 feet the same distance from the track to the street or crossing, so that when the cow started to run south she would be confined to this space of twenty-nine feet until she reached the crossing or street, when she could turn west away from the track, or east across the track.

On the day in question appellant's regular passenger and mail train, consisting of engine, mail and baggage car combined, and three passenger cars, left the station at Roodhouse for St. Louis. After passing a curve the train reached the straight track about 300 feet north of where the cow was, the train running at the rate of about ten miles per hour. Paul, the engineer, says: "After I started around the curve I saw a cow on the west side of the track, eating grass. As I came onto the straight track, she started and ran down the side of the track a little ways and then took off toward the west to a fence around some lots, and I supposed she was going where some cows were grazing out on some vacant lots. After running off in that direction she turned suddenly about on the road and attempted to go across the crossing, when I struck her and, I suppose, killed her." Other witnesses state that

the cow ran nearly all the way upon the track, while others think she ran close to the track, within a few feet of the ends of the ties. The cow was at large, in violation of the ordinances of the town, and at a place where the road was not required to be fenced; so that the rule of liability was, as laid down in *T., W. & W. Ry. Co. v. Barlow*, 71 Ill. 642: "The rule of liability, where an animal is unlawfully upon a railroad track, we conceive to be that the company is not in general liable, unless its servants, after they discovered that the animal was in danger, might, by the exercise of proper care and prudence, have prevented the injury; that it is not sufficient in such case to charge the company to show that they were running at a high rate of speed, or without proper care in other respects."

The unquestioned facts were, that the engineer saw the cow grazing at the side of the track, when at least 300 feet from her; that upon approaching her he saw that she started to run south, and that she was confined to the space between the track and the fence, twenty-nine feet wide, and could not turn west, except to press closer to the fence until she should run a distance of about 130 feet to the crossing, and that then it would be impossible to tell whether she would turn west, as the engineer says he expected her to do, and thus escape, or turn east across the track, as she did. The distance within which the train could have been stopped is shown by the fact that after the cow was struck, the train was stopped within the length of the engine and baggage car. The railroad was fenced south of the crossing, so that the animal was compelled to turn at the crossing. The engineer states that he did everything he could to stop the train when he saw the cow trying to cross the track, but made no attempt to do so prior to the moment that she reached the crossing and suddenly rushed on the track ahead of the train. We think it was a question for the jury to find from the facts whether the engineer was exercising proper care and prudence in thus racing along immediately behind this animal, without attempting to check his train, upon the mere hope or expectation that when she emerged from the trap where she

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was and reached the crossing, she would turn west instead of east; and their conclusion that the engineer, after he discovered the animal was in danger, might, by the exercise of proper care and prudence, have prevented the injury, we do not feel warranted in disturbing.

The instructions of appellee are not subject to the objections made by appellant, but are substantially correct.

The judgment of the Circuit Court will be affirmed.

Affirmed.

JOSEPH HATTON

V.

THE VILLAGE OF CHATHAM.

Municipal Corporations—Platting of Town—Alleys—Encroachment—Ordinance—Fine—Notice—Ejectment.

1. In the absence of an adverse possession, the mere platting of a town gives the public the right to the use of the streets and alleys.

2. Upon appeal from a judgment imposing a fine for a violation of a village ordinance, in relation to obstructions in its streets and alleys, it is *held*. That the village need not resort to an action in ejectment, and that the written notice given was sufficient.

[Opinion filed February 17, 1887.]

APPEAL from the County Court of Sangamon County; the Hon. J. H. MATHENY, Judge, presiding.

Messrs. PALMERS & SHUTT, for appellant.

Messrs. PATTON & HAMILTON and NOAH H. TURNER, for appellee.

CONGER, J. The Village of Chatham was laid out and plat-
ted in 1836. In 1859 one Smith owned lots 13, 14, 15 and 16,
constituting the southeast quarter of block 5 of said village,

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and built a barn and fence on the alley at the north end of lot 16, and the barn still remains where originally placed. It is claimed by the village, but denied by appellant, that said barn and fence encroaches upon the alley some two feet at one place and six at another. The court below found such encroachment to exist, and in the consideration of the case we shall assume such finding to be correct.

Appellant now owns said lots by conveyance from Smith. In July, 1885, the president and board of trustees of the village passed an ordinance which provides that:

“The owner of any building or any structure or enclosure already erected or built extending into or encroaching upon any street, avenue or alley * * * within the village, who shall not remove the same within thirty days after being notified in writing to do so by the street commissioners, shall be subject to a fine of not less than ten dollars nor more than one hundred dollars.”

Written notice was given appellant to remove this barn and fence off of the alley, and upon his failure to do so he was prosecuted under the ordinance and fined \$10 before the Justice who originally tried the case, and the appellant appealed to the County Court, where the judgment was affirmed.

Appellant insists “That as the public, the village, has never had possession of the ground which is covered by the appellant’s possession and claim of title, the village must sue in ejectment and recover possession, and can not sue for a penalty,” and cites *City of Chicago v. Gosselin*, 4 Ill. App. 570, as authority for the proposition.

We are at loss, however, to discover the application of the doctrine announced in that case to this. In that case the street had never been open to public use. But in this case it is stated in the abstract prepared by appellant’s counsel, as an undisputed fact, that the town was laid out and platted in 1836, and that the lots in question ran back to this alley, which was, and is, sixteen feet wide. Mr. Porter states that he has known this alley since 1836, and owned lots on the northeast corner of the block in question, and says: “I suppose there was no use for the alley; sometimes it was fenced up, and sometimes it wasn’t.”

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From this it is reasonable to assume that the alley was laid off in 1836, and used when needed until encroached upon by Smith in 1859, and from that time to the present has been open a part of the time and fenced up a part of the time.

The mere fact that the alley was, prior to 1859, but little used because the lots bounding upon it were not inclosed, and therefore there was no necessity for keeping within its exact limits, would not interfere with its existence, or tend to show that it was not a legal public alley. Neither would it show that the village was not, during such time prior to its being fenced, in the possession of the same. The mere fact of platting a town gives the public the right to the use of the streets and alleys when at the time there is no adverse possession.

The other point relied upon, that the written notice was signed by the president and clerk of the Board of Trustees, and not by the street commissioner, has no merit.

The notice plainly indicated its purpose. It was given appellant by the street commissioner, and was at least a substantial if not a technical compliance with the ordinance.

The judgment of the County Court will be affirmed.

Judgment affirmed.

HANS H. LITTLEFIELD

V.

ROBERT SCHMOLDT.

Practice—Nunc pro Tunc—Mechanic's Lien—Amendment—Notice.

1. In proper cases the court may allow amendments and proceedings in a cause to be filed *nunc pro tunc*. But this should never be allowed when it would work injustice.

2. Where a trial has been had upon a petition for a mechanic's lien, it is improper to allow amendments and to enter a decree *nunc pro tunc*, without notice to the defendant. Where this has been done, the fact that injustice may have been done the defendant is sufficient ground for reversal.

[Opinion filed February 17, 1887.]

Littlefield v. Schmoldt.

APPEAL from the Circuit Court of Cass County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. MORRISON & WHITLOCK and MILLS & McCLURE, for appellant.

Messrs. HEWITT & THACKER, for appellee.

CONGER, J. On the 29th day of September, 1885, appellee filed his bill to enforce a mechanic's lien against one Wm. Bennett and appellant, alleging that on or about May 23, 1885, Wm. Bennett and Hans H. Littlefield were about to enlarge and repair a barn on lot 3, block 21, in Beardstown, Illinois, and contracted with appellee for lumber, shingles and other building materials to be used in and about the improving and repairing of such barn. Appellant answered denying the making of any contract, express or implied, or that the material was bought with his knowledge and consent, or that he was consulted about the purchase of the materials, etc. Replication being filed the cause was, on the 16th day of October, 1885, referred to the master to take and report the proofs.

On the 19th of August leave is granted appellee to amend his bill, which the record says was done. Bennett is dismissed from the cause and the record then proceeds: "And the court finds for the petitioner herein, and thereupon, by consent of the parties hereto, the decree herein is to be signed in vacation as of this term of court." The appellant then prays an appeal, which is allowed, etc.

The amendment, which appears to have been made in August, was in fact filed on the 10th day of September, 1886, as of the 19th day of August, 1886, and it set up an express contract as the basis for a lien. To this amendment a demurrer on the part of appellant was filed September 14, 1886, but which was never passed on.

On the 13th of September, appellant made an affidavit which was filed in the clerk's office on the next day, setting forth that he has upon that day for the first time seen and read the amended bill filed on the 10th of September, that he

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is surprised by it, and unable to go to trial upon it during vacation. And after setting forth the particulars wherein the amendment is different from the original bill, asks that the case be not passed upon until the next regular term of the court convenes, which will be in three weeks from that day.

On the 27th day of September, 1886, counsel for appellant received the following letter from Judge Herdman.

Copy of letter:

“JERSEYVILLE, ILL., September 27, 1886.

“R. W. MILLS, Esq.,

“Virginia, Ill.

“*Dear Sir:* Herewith I return to you all the papers in the case of Robert Schmoldt v. Wm. Bennett et al., without signing the decree. I have been too busy since I received the papers on the 16th inst. to read them until now. As you will have a term of court beginning next week, there will be but little time lost in having a hearing on the amended petition, which I think is best now, as the amendment seems to be broader than was contemplated. Show this to Messrs. Hewitt and Thacker and J. N. Gridley, so they may know in time to avoid unnecessary delay.

“Yours truly,

“GEO. W. HERDMAN.”

On the 10th day of November, 1886, in vacation after the the October term, 1886, at chambers, before Judge Herdman, appellee, by leave of the Judge, withdraws the amendment filed September 10th and makes another amendment without notice to appellant, so far as the record shows, and upon that day the final decree is signed by the Judge and filed in the clerk's office, as of August 19, 1886.

The evidence in this case does not make it entirely clear that justice has been done appellant, though we should not be disposed to interfere with the conclusion reached by the Circuit Court were it clear that appellant had been given an opportunity to fully make his defense. There is no impropriety in proper cases to permit amendments and proceedings in a cause to be filed *nunc pro tunc*, but it should never be allowed when it works injustice, and in this case there is at least a probability that such has been the effect.

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The trial was had upon the original bill, proofs and arguments addressed to the court upon the theory presented by it. Afterward, without notice to appellant, the bill is changed, a decree rendered upon it, and appellant, though diligent in seeking a hearing upon the amended bill, is informed that by a fiction of law these amendments and proceedings are supposed to have taken place in August, when he did have the opportunity of meeting and replying to them.

We can not know nor are we called upon to assume that injustice has actually been done appellant by these proceedings. It is enough to say that such may be the case, and that appellant has not had an opportunity to meet the allegations of the amended bill, as the law intends he shall.

For these reasons we feel constrained to reverse the decree of the Circuit Court and remand the cause.

Reversed and remanded.

THOMAS GARDINER, SHERIFF,

V.

JOHN W. BUNN & COMPANY.

Practice—Second Appeal—Defective Possession by Sheriff—Rights of Third Parties.

1. Upon a second appeal this court declines to reconsider the questions passed upon when the case was here before.

2. Although the original possession of goods by a Sheriff may have been defective, third parties can not complain if such possession was perfected by a legal and complete levy before their rights attached.

[Opinion filed February 17, 1887.]

IN ERROR to the Circuit Court of De Witt County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. MOORE & WARNER, for plaintiff in error.

Mr. JOSEPH M. GROUT, for defendants in error.

24 637
145 166
24 627
61 225

 Butler v. Merrick.

Per Curiam. This case was before us at the November Term, 1885, and is reported in 18 Ill. App. 94, when the judgment of the Circuit Court was reversed and the cause remanded.

Upon a second trial the court below proceeded upon the theory of the law held by this court, and we are now asked by appellant to review the same questions that were passed upon when the case was here before. We decline to do so.

Appellee assigns as cross error the holding of the court below as to the Pettingall execution, but we think such holding was correct.

However defective the possession of the stock of goods by the Sheriff may have been originally, it was perfected by a legal and complete levy and possession before appellee's rights attached.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

24 628
48 651

SALOME E. BUTLER

V.

BRIDGET MERRICK.

Partnership—Existence of—Special Agreement—Construction—Profits and Losses.

1. In an action to charge the defendant as surviving partner of her brother, who was indebted to the plaintiff at the time of his death, it is *held*: That as between the defendant and her brother there was no partnership, their minds never having met on that proposition; that a certain agreement, the contents of which were unknown to the defendant, did not constitute them partners; and that the credit in question was not extended on the belief that they were partners.

2. Participation in profits and losses is not conclusive of the question whether a partnership exists.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. J. A. McCLEARNAND and N. M. BROADWELL, for appellant.

It appears from the evidence that Speed Butler sank, or constructed, this shaft in 1880, and in December of that year commenced the business of raising and selling coal.

About this time Speed Butler, in view of forming a partnership with his brother Wert, adopted the name and style of "Speed Butler & Co.," and under that name and style carried on the business of the shaft up to the time of his death.

Thus the origin and continuation of the firm name is fully explained and shown; and it does not appear that appellant had any, the slightest, agency or instrumentality in coining the firm name or in holding the same out to the world. She is, therefore, not responsible for the conduct of her brother Speed, in doing business under a name and style which implied a partnership between him and some other party or parties.

To make appellant liable as a partner, upon the ground that she held herself out as a partner, it must not only appear that she did hold herself out as a partner, but it must be further shown that appellee had knowledge of such fact, and gave credit on the faith of it. *Bowen v. Rutherford*, 60 Ill. 41.

A partnership can not be proven by general reputation, and a person can not be made a partner in fact or in appearance, so as to bind him, except by his consent, admissions or acts. The declarations or acts of others can not bind him. *Bowen v. Rutherford*, 60 Ill. 41; *Bishop v. Georgeson*, 60 Ill. 484.

The provision found in the paper, that the profits and losses shall be divided in a certain way between the parties, does not, in law, constitute a partnership. This stipulation no more implies a partnership than it does a joint adventure as tenants in common. It is as applicable to the latter as it is to the former.

It is accordingly held that such a provision does not necessarily constitute a partnership between the parties. *Niehoff v. Dudley*, 40 Ill. 406; *Dwinel v. Stone*, 30 Me. 384; *Donnell v. Harshe*, 67 Mo. 170; *Rice v. Austin*, 17 Mass. 197.

In *Niehoff v. Dudley*, it is said by the court, page 409:

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“There is no absolute rule of law that a participation in the profit renders the participant a partner. It is only a presumption of law which prevails in the absence of controlling circumstances, but is controlled by them. This seems to be the extent of the rule announced by the authorities. And there is no hardship on third persons when the party does not hold himself out as a partner.”

Messrs. PALMERS & SHUTT, for appellee.

The contract was, by its very terms, executed. By the terms of the agreement, by present words of grant, “he hereby sells to the party of the second part, the one-fourth interest in the coal mine known as the Black Diamond Mine,” and provides that one-quarter of the gains and losses shall, from that time, belong to his grantee.

There must always be a distinction in law as well as in fact, between an agreement for the formation of a partnership to embark in a new business and the sale of an interest in, or the admission of a new partner to an established business—a going concern. In one case a great variety of acts preparatory to the commencement of business must be performed; in the other case the business does not begin, it only continues.

“When an existing partnership takes in a new partner by a written instrument signed by the old members and the new, which instrument recites the payment of a certain sum by the incoming partner, and conveys to him one-third interest in the assets, and consents that he shall have one-third interest in the profits, the new partnership is complete on the execution of the instrument.” *Phillips v. Nash*, 47 Ga. 218; 1 *Lindley on Partnership*, 27.

Everything was done at and before the execution of the agreement which could be done to make it an executed one, and after the signing of the contract everything was done that can be imagined in order to carry it into effect.

It is an universal rule, that if one is a partner in fact he will be liable whenever discovered without any reference to his own acts or conduct with respect to the firm business.

WALL, J. The appellant was sued as surviving partner of Speed Butler, deceased. She denied by the proper pleading all liability as such partner, and thus presented the only issue of fact in controversy.

It was not disputed that the plaintiff below had a valid claim against Speed Butler and against appellant also, if, upon the facts, appellant could properly be treated as a partner.

Speed Butler had opened a coal mine upon a tract of land which seems to have belonged to his minor children. In doing so he became indebted to the appellant, his sister, in the sum of \$13,000, and to secure her the following paper was executed:

"This agreement entered into this — day of May, A. D. 1881, between Speed Butler, as trustee of Anna S. Butler, Jennie E. Butler and Arnold W. Butler, of the County of Sangamon and State of Illinois, the party of the first part, and Salome E. Butler, trustee, of the same place, the party of the second part.

"Witnesseth, that the party of the first part hereby sells to the party of the second part, in consideration of the sum of thirteen thousand dollars, and the agreements of the party of the second part hereinafter mentioned, the one-fourth ($\frac{1}{4}$) interest in the coal mine known as the Black Diamond Mine, situated on the southeast quarter ($\frac{1}{4}$) of section 4, township 15 north, range 5, west 3d P. M., in the County of Sangamon, State of Illinois, under the conditions following:

"*First.* One-quarter of one cent on each bushel of coal, to be deducted and paid to Speed Butler at the end of every month on all coal hoisted and sold in said month, as royalty, and this amount as royalty to be paid before anything else is paid from the proceeds of said mine.

"*Second.* Speed Butler to have entire management and control of all matters in connection with said mine.

"*Third.* A full and satisfactory settlement to be made at the end of each month, and whatever losses or gains of that month to be divided, one-quarter of such gains or losses to belong to Salome E. Butler and the remainder to belong to Speed Butler.

"*Fourth.* All coal to be taken from under the land belong-

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ing to the heirs of said Speed Butler, and no coal to be taken out of said coal shaft from any other source, without the full consent and approval of said Speed Butler.

“*Fifth.* In case of the death of said Speed Butler, his executors, administrators or trustees to have the same authority as he himself now has in the premises.

“*Sixth.* If at any time this quarter interest now sold in said mine is to be resold, Speed Butler is to have the right to be first purchaser, if he so desires, at whatever price may be offered by any other *bona fide* purchaser, and this quarter interest can not be resold to any party that may be objectionable to said Speed Butler.

“*Seventh.* If at any time it should be considered by the parties advisable to connect “tile works” with said mine, the expense of so doing will be in the same proportion as one to three, and the profits or losses therefrom will likewise be in the same proportion.

“In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

“SPEED BUTLER, [SEAL]

“SALOME E. BUTLER.” [SEAL]

“The party of the first part hereby agrees to watch over and protect this interest in the same manner as though it belonged to himself.

“SPEED BUTLER.”

The appellant testified that she did not read the paper, and only signed it because her brother told her to do so; that she did not know its contents and supposed it merely gave her security upon the property. It was never in her possession. She had no idea there was anything in it creating a partnership or any other liability on her part, and though she subsequently advanced \$5,000 more to her brother, she never received anything from him in the way of a statement, or otherwise, to indicate such a relation. Her name did not appear on the books of the concern, which was conducted under the style of Speed Butler & Co., nor was there anything in the accounts to show that she was in any wise connected with the business. She was never consulted about the management of

it, was never at the mine but once, and the only transaction she had there was in the purchase of some coal for her own use. Speed Butler died in April, 1885, and appears to have been considerably in debt on account of his mining operations. Then for the first time appellant heard the claim made that she was liable as a partner.

It is not proved that she ever said or did anything from which a partnership can be inferred, aside from the execution of the paper above quoted.

This paper was spread upon the records of Sangamon County, June 13, 1881. The effect of so recording it need not be considered in the present case, for the reason that it does not appear the appellee ever knew of the existence of the paper or that it had been so recorded. As between the appellant and Speed Butler there was no partnership, for the reason that the minds of the parties never met on that proposition.

It is not at all probable that Speed Butler ever considered a partnership was thereby or otherwise created, and it is certain that she never so understood it.

The mere signing of this paper, not knowing or misapprehending its contents, would not make her a partner as between her and her brother. If the paper is such as to constitute a partnership according to the legal effect of its terms, and if a third person, relying in good faith upon the information derived from it, is induced to furnish goods or give credit upon the belief that the persons executing it are bound as partners, then a different question will arise. So far as this record discloses, the parties were not, as between themselves, partners, nor has the appellant done or said anything on which appellee may or does rely to incur such a responsibility. Upon the undisputed facts in proof we have no hesitation in holding there was no partnership.

We deem it unnecessary to discuss the provisions of the instrument in question. It is assumed by counsel for appellee that a participation in profits such as here stipulated for will constitute a partnership. Such may be a presumption, but it is not conclusive, prevailing in the absence of controlling cir-

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cumstances, and subject to be so controlled. If, upon an inspection of the whole instrument, it can not be inferred reasonably that a partnership was designed, then none would be inferred from this single provision. *Niehoff v. Dudley*, 40 Ill. 406; *Story on Partnership*, Sec. 38; *Bowen v. Rutherford*, 60 Ill. 41.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

MARY BAITER
V.
GEORGE LAWSON.

Landlord and Tenant—Distress—Evidence—Conflict of—Notice of Termination of Agency—Question for Jury—Instructions.

1. Where there is a sharp conflict in the evidence this court will not interfere with the verdict of the jury, unless there is some substantial error in the record which probably contributed to the result.

2. In an action of distress for rent, unless the warrant contains an allegation or charge that the defendant by good husbandry might have made a better crop, evidence to that effect is inadmissible.

3. In the case presented, it is *held*: That the question whether the defendant had notice that the agency of a third person had terminated, was for the jury; that a certain conversation between him and such third person was properly admitted; and that there was no substantial error in giving and refusing instructions.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Hancock County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. HOOKER & EDMUNDS, for appellant.

Messrs. O'HARRA & SCOFIELD, for appellee.

WALL, J. This was an action of distress for rent by appellant against appellee. The warrant was levied by the Sheriff upon a quantity of corn.

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The defendant by plea denied that he owed anything to plaintiff. Upon a trial in the Circuit Court a verdict was rendered in favor of defendant, which the court declined to set aside, and the case is brought here by the appeal of the plaintiff. Numerous points have been presented for our consideration, but the most important, and, as we think, the controlling question, is one of fact, whether the rent was paid according to the terms of the lease; and this again is narrowed to whether the grain rent was to be delivered on the farm or hauled to La Harpe. It is unnecessary to state in detail the various phases of the case as disclosed in the evidence or to comment upon the proofs. There was a sharp conflict but no such preponderance either way as to require this court to interfere with the verdict, and unless there is some substantial error in the record which probably may have contributed to the result, we can not disturb the judgment. It is urged that the court excluded evidence offered by plaintiff tending to show that the defendant by good husbandry might have made a better crop and thereby increased the amount of rent to be received by the plaintiff. The distress warrant which, under the statute, Sec. 20, Ch. 80, stands for a declaration and is amendable as such, contained no allegation or charge under which such proof could be admitted, nor does it appear that leave was desired to amend for such purpose. There was no error in this ruling.

It is claimed the court erred in allowing proof of the conversation between Abram Bainter and the defendant, in reference to an alleged sale of the corn to the latter. It is a matter in dispute whether, when this transaction occurred, the defendant had been advised or notified that the agency of Abram Bainter had ended. If he was not so informed he might rely upon any arrangement made with him in reference to the matter and to prove what the arrangement was he might state the conversation. Upon his theory of the case the defendant was entitled to make this proof, and it was for the jury to determine the questions of notice and good faith that were involved therein.

The appellant complains that all the instructions given for

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appellee except the 6th and 7th are erroneous. The objection urged to all these, except the 9th, is mainly that the evidence did not warrant them. It would require an extended reference to the proof to discuss intelligibly this point as to each and all of the seinstructions. We deem it not necessary to do so, and it is sufficient to say that we find no substantial ground of complaint in this respect. The 9th advises the jury that the notice of termination of tenancy, which was served on the 23d of December, was not to be considered by the jury so far as the substantive parts of it were concerned; that it was admitted only for the purpose of making certain a date and was not to be considered by the jury for any other purpose. The record is not perfectly clear, whether this notice was allowed to be read in the first instance for this purpose only, or whether it was admitted generally. But if the latter is true the court had the right to make the limitation found in this instruction if such was the only purpose for which it was properly admissible. After considering all the evidence we are inclined to agree with the Circuit Court upon this point. It does not occur to us in what way this notice tended to prove, or disprove, the matter in issue, and if it had any evidential force it was to establish a date merely. At any rate we are unable to see any substantial error in this action of the court.

The appellant complains of the refusal of the court to give the 6th, 7th and 8th instructions. The refusal to give the 6th is disposed of in what has been said as to the giving of the defendant's 9th. The substance of the 7th, so far as it is really pertinent and proper to be given, is covered by the 9th given for plaintiff. The 8th was modified and then given, the modification being the subject of objection. We regard it as unimportant. The court gave ten other instructions for plaintiff, embracing all that was necessary to a correct understanding of the legal principles involved in the case. It is not apparent that the appellant has any just cause of complaint in this respect.

Finding no substantial error in the record, the judgment will be affirmed.

Judgment affirmed.

Hunter v. Harris.

JOHN B. HUNTER
v.
URBAN B. HARRIS, ADMINISTRATOR.

Evidence—Promissory Note—Action on by Administrator—Issue as to Genuineness—What may be Shown—Possession—Time and Place of Execution—Evidence Tending to Disprove Execution—Relevancy of—Practice.

1. Possession of a note declared on is evidence tending to show its delivery. The plaintiff may be permitted to show how long he has had possession of the note to aid the presumption arising from such possession.

2. In an action by an administrator on a promissory note, alleged to have been made to his intestate, the execution of which is denied, the plaintiff may show that the note existed prior to his appointment, among the other papers of the deceased and in the place where he usually kept such papers.

3. While the evidence must correspond with the allegations and be confined to the point in issue, it is not required that it shall bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof. It is relevant if it conduces to the proof of a pertinent hypothesis.

4. It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable.

5. Where the genuineness of a promissory note is in issue the defendant may show such facts as would exclude the possibility or probability of its execution at the time and place indicated upon its face.

6. While the date of a note is *prima facie* evidence of the time of its execution, it is not conclusive.

7. Where error has intervened in the trial of a cause, the judgment will be reversed, unless it appears that such error has not affected the result.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Sangamon County; the
Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. ALLEN, BROWN & BROWN and PALMERS & SHUTT,
for appellant.

Messrs. PATTON & HAMILTON, for appellee.

WALL, J. This was an action of assumpsit by the appellee

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against the appellant to recover the amount of a promissory note for \$10,000 alleged to have been made by appellant to Smith, the appellee's intestate, dated March 6, 1880, payable five years after date with six per cent. interest.

The declaration contained a special count on a note and the common money counts.

The pleas were, 1st, non-assumpsit; 2d, a plea especially denying the execution of the note, both verified by affidavit. There was a trial by jury and a verdict for plaintiff for the amount of note and interest. A motion for new trial was overruled and judgment was rendered upon the verdict. The record is brought here by appeal. The points made in the brief of appellant are, 1st, the court admitted improper evidence for plaintiff; 2d, the court excluded proper evidence offered by defendant.

The first point is based upon the admission of the testimony of a daughter of the payee of the note, to the effect that she saw it in his possession, in a pocket book containing other like papers, some two months before his death.

The possession of a note declared on is evidence tending to prove its delivery, and while it is true nothing more on that point is usually required, we see no reason why the plaintiff may not be permitted to aid the presumption arising from such possession by showing how long he had had such possession.

Where a suit is brought by an administrator upon a note alleged to have been made to his intestate and the execution of the instrument is denied, it is certainly competent to show, as a link in the chain, that the plaintiff did not commit the forgery, by proof that it existed prior to his appointment and that it was then among the other papers of the deceased and in the place where he usually kept such papers.

Such proof tends to show that a regular and orderly cause which is consistent with and to be expected in a *bona fide* transaction. It also tends to narrow and fix the period within which the instrument was forged, if ever. The evidence was competent, and there was no error in admitting it.

The second objection is based upon the exclusion of evidence offered by the defendant to prove that on the date of the

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note, March 6, 1880, the defendant and the intestate had but one transaction, and that of such a character as to preclude the belief, as is assumed, that the promissory note in suit could have been executed by the defendant or in contemplation by him.

Briefly stated this evidence tends to show that the deceased, who lived in Greenville, Bond County, went to see Hunter at his home, Buffalo, Sangamon County (where the note sued on purports to have been made), for the purpose of getting him to do something on account of past transactions wherein he, Smith, had made many payments as surety for Hunter, who had since then obtained a discharge in bankruptcy.

He stayed at the house of Hunter over night and until time to take the 10 o'clock train the next day, which was the 6th of March, 1880, the day the note sued on bears date.

There was some writing done that morning by Hunter, and the excluded evidence tends to show that the only paper so written was the following:

“JOHN B. HUNTER, President
“Western Live Stock Company,
“Buffalo, Ill., 3-6, 1880.

“W. S. SMITH, Greenville, Ill.

“*Dear Sir:*—I have concluded that, owing to our failure and you having to pay money for our old firm, that I would pay you in 1882 \$5,000, provided I don't have to pay any money in on your account to the Bank of Commerce; if so, the amount to be deducted from this amount together with any costs that may accrue.

“Yours very truly,
“JOHN B. HUNTER.”

Shortly afterward Smith went to the train and returned to his home. After leaving the house and while on his way to the train he said that Hunter had given him this paper obligating himself to pay \$5,000, and that while he was not satisfied with the settlement he had settled with him. He made declarations to the same effect on subsequent occasions. This paper was marked “renewed” and bore the indorsement of Smith in his handwriting, which indorsement had been erased.

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The evidence also tended to prove that Hunter afterward paid Smith \$250, and gave him his note for \$4,750, which note was transferred to St. Louis creditors of Smith, pursuant to an arrangement which was under consideration when some of Smith's declarations referred to were made. As we understand it, this paper dated Buffalo, March 6th, and the note of \$4,750 were in Hunter's possession, and were by him offered in evidence. Hence it is presumable he had taken them up by payment or renewal, or in some other way satisfactory to the holder. Various items of evidence, such as a letter to Hunter written by Smith asking for money on this agreement, the kind of ink in use at Smith's place of business, and that in which the body of the note sued on was written, etc., which were subordinate to what has been stated and need not be further specified, were also offered and excluded.

It is argued by counsel for appellee that the court properly excluded all this evidence, because the issue to be tried was as to the execution of the note in suit; and that while the facts thus offered in proof may have been true, they in no way tended to prove the non-execution of the note.

It is an established rule, governing in the production of testimony, that the evidence offered must correspond with the allegations and be confined to the point in issue. It is not necessary, however, that it should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue or constitutes a link in the chain of proof, although it might not justify a verdict in accordance with it; but the rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. 1 Greenleaf on Ev., 51, 52, 57a.

Evidence is relevant if it conduces to the proof of a pertinent hypothesis, a pertinent hypothesis being one which, if sustained, would legally influence the issue. It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable. Whatever is a condition of the existence or non-existence of a relevant hypothesis may be shown, but no circumstance is relevant which does not make more or less probable the proposition at issue. Wharton on Ev., Secs. 20, 21.

The issue was the execution of the note, the plea devolving the burden of proving the allegation as at common law.

There was no doubt proof on the subject, the only evidence being the fact of possession by the deceased, and the opinions *pro et con* of witnesses as to the genuineness of the signature.

The evidence which was rejected tended to show a state of facts somewhat inconsistent with the hypothesis of the plaintiff—to make less probable the proposition asserted by the plaintiff. True, it did not conclusively disprove the execution of the note, but it tended to show a condition of things from which the non-execution of the note was a reasonable inference. The date of a paper is *prima facie* presumed to give correctly the time of its execution and delivery if it is genuine. Wharton on Ev., Secs. 977, 1312; Abrams v. Pomeroy, 13 Ill. 298.

Surely it is competent to show such facts as would exclude the possibility or probability of its execution at the time and place purported, as, for example, that the supposed signer was then in a physical state that prevented him from writing his name; that he was confined in an insane asylum, or from some other cause was incapable of doing the act in question.

On the other hand it would have been competent for the plaintiff to prove such a situation as would render it natural and probable that the note was made as alleged, for example, an indebtedness sufficient to support it, or an admission of that fact by the defendant and a promise to execute a note for the amount.

In Wharton on Ev., Sec. 20, it is said that where one who is sued on a bill sets up forgery to meet this hypothesis, it is admissible for the plaintiff to prove that at the time the defendant was trying to borrow money. If the hypothesis set up by the defense is fraud, then all facts which are conditions of fraud are relevant.

The business relations of the parties might throw much light upon the question whether the note was probably made.

We are therefore of opinion it was error to exclude the substantial portions of the evidence referred to. It does not follow as a matter of course that plaintiff can not recover because it may appear the note was not executed at the time

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and place it purports, but such proof would be proper to consider in determining whether it was ever executed, and might have more or less weight when so considered in connection with all the evidence in the case.

When it appears that error has intervened in the trial of a cause, the judgment will not be reversed if it is clear that, notwithstanding the error, the result would have been the same. It can not be said with any degree of confidence that such would have been the case here.

We do not undertake to decide what might or should have been the conclusion of the jury had the testimony been admitted.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

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EMERSON, TALCOTT & COMPANY

V.

ROZELLA MARKS.

Wills—Life Interest in Lands—Execution against Devisee—Sec. 3, Chap. 77, R. S.

1. Real property devised to a daughter, "to hold as long as she lives, without the privilege of selling it to any person, and at her death * * to go to her children, if any," is not subject to sale on execution against her.

2. Sec. 3, Chap. 77, R. S., authorizes the sale under execution of only such interests as may be disposed of by the debtor himself.

[Opinion filed February 17, 1887.]

IN ERROR to the Circuit Court of Champaign County; the Hon. C. B. SMITH, Judge, presiding.

Mr. THOMAS J. SMITH, for plaintiff in error.

Mr. J. O. CUNNINGHAM, for defendant in error.

WALL, J. David Shirk, of Park County, Indiana, by his last will gave to his daughter, Rozella Marks, a tract of land

containing eighty acres, in Champaign County, Illinois, "to hold as long as she lives, without the privilege of selling it to any person, and at her death it is to go to her children, if any."

The question presented by this record is whether the interest of the devisee is subject to sale on execution against her. She is in possession of the land and has been since the death of the testator. There can be no doubt that the limitation placed upon the devise, whereby the devisee was prevented from selling, is valid, and may be enforced by the appropriate legal means.

It is not within the rule against perpetuities. The manifest purpose of the testator was to give the use and enjoyment of the land merely, a purpose lawful in itself, not inconsistent with public policy, and induced, as it must be presumed, by sound reasons satisfactory to the testator. If this design can be frustrated by obtaining a judgment against the devisee and selling the land under execution issued thereon, the limitation is of little or no value. By this means a sale might readily be effected in direct contravention of the plain provision of the will.

In *Waldo v. Cummings*, 45 Ill. 421, the court upheld a testamentary provision that the property therein disposed of should not be subject to the debts of the legatees.

The will having so provided, and being recorded, all persons had notice of what it contained, and no one would give credit to the legatees with the belief that the fund could be rendered liable for the debt; and it was said that when the testator declared that the fund should be beyond the reach of the creditors of the legatees, he only exercised a right given to him by law in disposing of his property. In the case of *Steib v. Whitehead*, 111 Ill. 247, the testator devised to trustees certain real estate, upon the trust to rent the lands and tenements, make repairs, pay taxes and insure the buildings, and to pay the remaining rents and income in cash to his daughter J., in person, and not upon any written or verbal order, nor upon any assignment or transfer by said J., and at the death of said J. the lands should vest in the heirs of her body.

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The question there presented was whether the money so derived by the trustees could be reached by process of garnishment at the instance of the creditors of the said J. It was answered in the negative. Thus the only provision involved was, in substance, like the one in the case at bar—a prohibition against a sale by the beneficiary; but to render it effective it was obviously necessary to guard the fund against the demands of creditors. The court said the creditors had no ground to complain that they had been misled by the provision made by the father. It was his own bounty, and, so far as they were concerned, he had a right to dispose of it as he pleased. Counsel seek to distinguish that case, because the property was given in trust, but the distinction is unimportant. The principle involved must be the same, whether the property is devised in trust or placed directly in the hands of the donee.

The limitation can be made effectual only by declaring that no indirect means shall accomplish what is lawfully forbidden by the will.

Sec. 3 of Chap. 77 can not be made applicable. It must be intended to authorize the sale upon execution of such interests only as the debtor would have the power to dispose of—interests unfettered by restraints upon transfer. It would be anomalous if any interest which a debtor could not sell, and which he could enjoy only by its use, might be sold by his creditor, and thus the lawful purpose of the donor defeated.

We are of opinion the Circuit Court ruled properly in quashing the levy, and the judgment will be affirmed.

Judgment affirmed.

CHICAGO & ALTON RAILROAD COMPANY

v.

HENRY M. HUNT AND WILLIAM KESSINGER.

Railroads—Escape of Fire from Locomotives—Precautions Required—Rule—Instructions.

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1. It is the duty of railroads to use every possible precaution to prevent loss to others through the escape of fire or sparks from their engines, by the highest degree of diligence in ascertaining and adopting the best or most approved mechanical inventions and appliances to prevent the escape of fire.

2. In an action against a railroad company to recover damages for the alleged burning of a building by sparks emitted from the defendant's locomotive, it is improper to instruct the jury that it was the duty of the defendant to use "all the best and most approved mechanical inventions" to prevent loss from the escape of fire or sparks from its locomotives.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of Green County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

Messrs. MARK MEYERSTEIN and JOHN I. RINAKER, for appellees.

CONGER, J. This suit was brought by appellees to recover damages for the alleged burning of their elevator by sparks emitted from one of the locomotives of appellant at White Hall, Illinois, on the 9th day of July, 1885, and they recovered a judgment for \$8,022.50.

The first instruction given for appellees was as follows: "No. 1. The court instructs the jury for the plaintiffs, Hunt and Kessinger, that if they believe from the evidence that the plaintiffs' elevator and contents of same, in question in this suit, were destroyed by fire on or about the 9th day of July, 1885, by fire or sparks escaping from the defendant's locomotive while passing along the railroad, in manner and form charged in plaintiffs' declaration or any count thereof, then, under the laws of this State, the plaintiffs have made out a *prima facie* case of negligence of the defendant, and by law the burden of proof is then upon the defendant to overcome such *prima facie* case of negligence by a preponderance of the evidence; first, that the defendant used, at the time it is charged the elevator was destroyed by fire, as above stated,

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every possible precaution *by the use of all the best and most approved mechanical inventions on the locomotive then used* to prevent loss from the escape of fire or sparks from such locomotive along the line of its road; second, that such locomotive engine and all such appliances to prevent loss from escape of fire or sparks, as above stated, was at the time in good repair; lastly, that said locomotive engine was at the time carefully and skillfully handled by a competent engineer."

We do not think this instruction correctly states the law. It informs the jury that it is the duty of appellant "to use every possible precaution, *by the use of all the best and most approved mechanical inventions* on the locomotive then used, to prevent loss from the escape of fire or sparks from such locomotive along the line of its road." This is stating the rule too broadly. Railroads can not comply with its requirements, although they may have the very best mechanical inventions known, unless such inventions have also been so generally used upon railroads as to be regarded as *approved*, the road would be in fault.

On the other hand, although appellant might use those inventions in general use and generally *approved* by those having skill and experience in such matters, still if it could be shown that there existed a better invention which had not come into general use, and of the existence of which perhaps appellant, by the highest degree of diligence, could not know, it would be condemned under the language of this instruction.

We think a compliance on the part of appellant with either branch of the proposition would absolve it from liability.

If appellant could show that the mechanical contrivance used upon its engines for arresting sparks was better and more effective to accomplish that purpose than any other, it would surely have performed its duty, although it might be shown that such contrivance had not come into general use, and therefore had not been approved by railroads generally. On the other hand, in the language of the Supreme Court in T., W. & W. Ry. Co. v. Com'r, 71 Ill. 496, "The rule announced in these cases only requires the use of the most approved machinery, but not the best known that mechanical skill and

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ingenuity can devise and construct, whether approved or even unknown to appellants or perhaps beyond their means of being known by the use of all reasonable efforts.”

We think the true rule is that it is the duty of railroads to use every possible precaution to prevent loss to others by escape of fire or sparks of fire from their engines, by the highest degree of diligence in ascertaining and adopting the best or the most approved mechanical inventions and appliances to prevent the escape of fire.

One of the vital questions made in the case was as to whether appellant had complied with its duty in providing the locomotive, from which it is charged the fire originated, with proper safeguards against emitting sparks. Hence the error in this instruction was fatal to a fair and proper presentation of the question to the jury, and requires a reversal of the judgment, that, upon a new trial, the law upon this question may be properly given to the jury.

We see no objection to appellees’ ninth instruction, but think it is supported by Sec. 104, of Chap. 114, R. S.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

NATHANIEL N. WINSLOW

V

CITY OF BLOOMINGTON.

Municipal Corporations—Nuisances—Ordinance—Soap Factory—Fine—Instruction—Conflict of Evidence—Question for Jury—Trial—Discretion.

1. Where the evidence is conflicting and the jury do not appear to have been influenced by prejudice or passion, the court will not interfere with the verdict.

2. In an action under a city ordinance to have a fine imposed on the defendant for conducting a soap factory and tallow chandlery in such a manner as to be foul and offensive, it is proper to instruct the jury that the defendant has no right to carry on such a business in a populous city

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unless it can be done without emitting offensive and noxious odors so as to be detrimental and offensive to the people of its locality.

3. A trial court may, in its discretion, require a case to be closed within a particular time.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. WILLIAM E. HUGHES and KERRICK, LUCAS & SPENCER, for appellant.

Mr. W. E. GAPEN for appellee.

CONGER, J. This was a suit originally brought before a Justice of the Peace, by the city against appellant for an alleged violation of the following ordinance of the City of Bloomington.

“Sec. 16. Whoever shall hereafter erect within said city, any soap factory, tallow chandlery, tannery, distillery or brewery, without permission of the City Council, or whoever, with such permission, shall conduct any establishment of the character aforesaid in such manner that the same shall become foul or offensive, or shall emit or give out bad, offensive or unwholesome smells or odors to the annoyance or detriment of any community, family or person, shall be deemed guilty of a nuisance, and on conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars.”

The information on which suit was brought states “that at said city, on or about the 17th day of August, 1885, one Nathaniel N. Winslow did conduct an establishment of the character of a soap factory and tallow chandlery in such a manner that the same was foul and offensive and emitted and gave out bad, offensive and unwholesome smells and odors, to the annoyance and detriment of the community of Albert Street and of divers families and persons in the fourth ward in said City of Bloomington, contrary to the ordinances of said city in such case made and provided.”

The case was appealed to the Circuit Court, when, upon a trial, appellant was fined \$25, and he brings the case to this court and asks a reversal upon two grounds: First, that the verdict of the jury was contrary to the evidence; and secondly, the court erred in giving the first of appellee's instructions.

The evidence is very voluminous and it would subserve no useful purpose to enter into a discussion of it.

A large number of witnesses testify to offensive and unwholesome smells and odors proceeding, as they think, from appellant's factory, while on the other hand a still larger number upon the part of appellant reach a different conclusion, some thinking the bad odors noticed in the neighborhood proceeded from other sources, and others again testifying that appellant's factory was kept as clean as a place of that kind could be.

The question was fairly submitted to the jury, and it was their province to determine whether appellant's factory was conducted in such manner as violated the provisions of the ordinance. We see no evidence of prejudice or passion upon their part, so far as the record discloses, and we do not feel justified in interfering to disturb their finding.

Complaint is made of appellee's first instruction, which is as follows:

"1. If the business of a soap factory and tallow chandlery can not be carried on without emitting offensive and noxious odors, so as to be detrimental and offensive to the people of that portion of the city where located, then the owner of such factory has no right to carry on such business in a populous city, and it is no defense to say it was conducted as well as it could be.

A number of witnesses were examined by appellant to show that the premises were kept clean and the business properly conducted, one witness stating, "It (appellant's factory) is kept as clean as a place of that kind can be."

The jury, without knowing the rules of law governing such a business, might conclude that if appellant used reasonable diligence in keeping his premises as clean as a soap factory and tallow chandlery could be kept, that he would not be

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answerable for offensive smells emitted from his factory under such circumstances, and we see no objection to the court instructing them as to the law upon that point.

The objections made to this action of the court in requiring the case to be closed within a particular time are not well taken, as we think the court did not abuse the discretionary power vested in it, but acted fairly and with a due regard for the rights of all parties to the cause. The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

CITY OF BLOOMINGTON ET AL.

V.

CHARLES BLODGETT.

Municipal Corporations—Special Assessment—Excessive Levy—Remedies—No Jurisdiction in Equity—Injunction.

1. A municipal corporation may proceed to assess and collect a special assessment based upon an estimate made in conformity with Secs. 20 and 21, Art. 9, Chap. 24, R. S., although such estimate may exceed the actual cost of the proposed improvement.

2. When it clearly appears that there has been an excessive levy, such excess becomes a legal defense, *pro tanto*, which may be interposed before the confirmation of the assessment, or when the collector applies for judgment against the property assessed.

3. All proper objections and defenses arising subsequently to the confirmation of an assessment may be set up when the collector seeks judgment.

4. A bill in equity does not lie to enjoin the collection of an excessive levy for a special improvement, there being an adequate remedy at law.

[Opinion filed February 17, 1887.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Mr. A. E. DEMANGE, City Attorney, for appellants.

A court of equity will never enjoin the collection of a tax

24	650
150	559
150	588
24	650
165	827
24	650
173	33
24	650
177	586

except when such tax is unauthorized by law or the property taxed is not subject to taxation; nor even in such cases without special circumstances showing that the collection of the tax would work irreparable injury or cause a multiplicity of suits. Cook County v. C., B. & Q. R. R. Co., 35 Ill. 460; McBride v. City of Chicago, 22 Ill. 574; City of Ottawa v. C. & R. I. R. R., 25 Ill. 29; Brown v. City of Chicago, Vol. 7, No. 2, N. E. Rep. 108; Moore v. Wayman, 107 Ill. 192.

A special assessment is a tax within the above rule. Cook County v. C., B. & Q. R. R., 35 Ill. 460, 467.

The amount of an assessment and all matters upon which appellee could have been heard in the trial for confirmation of the assessment, and, on application by the county collector for judgment against the real estate for a sale thereof, are *res adjudicata*. People v. Brislin, 80 Ill. 423; Andrews v. People, 84 Ill. 28, 33.

The court had no power to grant the relief sought by the amended bill. Starr & C. Ill. Stat., p. 2101, Sec. 224; Moore v. Wayman, 107 Ill. 192.

Appellee has an adequate remedy at law in assumpsit. Cook County v. C., B. & Q. R. R. Co., 35 Ill. 460, 467.

Messrs. BLANDES & NEVILLE, for appellee.

If appellee had paid the full amount of the assessment he would have been entitled to recover back the excess. Cooley on Taxation, 463.

Not having paid it, equity will not require him to pay more than his proportionate share of the cost, and will restrain appellants from clouding his title by sale to make the amount of the excess to which the city is not entitled. High on Injunctions, Secs. 372, 524, 525, *et seq.*; Chirstie v. Hale, 46 Ill. 117; Bennet v. McFadden, 61 Ill. 334; Groves v. Webber, 72 Ill. 606.

CONGER, J. This was a bill in chancery praying an injunction to restrain the City of Bloomington and the county collector of McLean County from advertising or selling certain real estate belonging to appellee, or otherwise attempting to

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collect a special assessment of \$132.50 levied upon town lots of appellee for the purpose of constructing a sewer in the City of Bloomington.

The bill alleged that an ordinance for the construction of such sewer was passed and commissioners appointed to report an estimate of its costs; that they made a report estimating the cost at \$3,900, which was affirmed; that a petition was filed in the County Court for the appointment of commissioners to make a special assessment, which they did, and it was confirmed by the County Court.

That said commissioners assessed the city for public benefit, \$1,611, and the balance of the \$3,900 upon lot owners, assessing appellee's lots at \$132.50; that afterward the contract for the construction of such sewer was let for \$2,900, or about \$1,000 less than the estimated cost and assessment; that the city had already collected from lot owners an amount which, if added to the amount assessed against the city, would exceed the entire cost of the sewer. By an amendment subsequently made, it was alleged that the proportional sum which appellee should pay upon his lots, taking the contract as the basis of the costs of the sewer, would be about the sum of \$98.53, which sum appellee offered to pay, and prayed the balance should be enjoined.

The court below decreed that appellee pay to the clerk of that court, for the use of the city, the said sum of \$98.53 with interest, and that as to the balance the injunction should be made perpetual.

It is clear that appellee should have some remedy to prevent the city from collecting from him the excess of the assessment over the true amount necessary for him to pay, as his proportion, as fixed by the commissioners, based upon the cost of the sewer.

We think it does not sufficiently appear from the allegations of the bill that appellee had no remedy at law.

The time when the contract was let and the appellee and others thereby apprised what would be the actual cost of the sewer is not stated in the bill.

If the excessive and unnecessary levy was known to appel-

lee at the time, or before the judgment of the County Court confirming the assessment of the commissioners, as provided in Secs. 30 and 31 of Art. 9, Chap. 24, R. S., he should then and there have made his defense.

If not known at that time, but the error is discovered at or before the time when the county collector applies to the County Court for judgment against the lots, at the time of applying for judgment against lands for taxes due the State and county, appellee may, at that time, make his defense under the provisions of Sec. 39, Art. 9, Chap. 24, R. S., for the reason that the objection would be based upon facts discovered after the original judgment confirming the assessment, and hence could not have been interposed as a defense at the time the assessment was confirmed.

The last clause of Sec. 39 is: "And, upon application for judgment upon such assessment, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof."

The meaning of this clause is that all proper objections and defenses arising subsequently to the confirmation of the assessment, and which could not, therefore, have been interposed in that proceeding, may be set up when the collector seeks a judgment; that the confirmation of the assessment by the County Court is final and conclusive only as to all defenses and objections existing at that time.

The city may undoubtedly proceed to assess and collect special assessments based upon the estimate made in conformity with Secs. 20 and 21, Art. 9, Chap. 24, although such estimate may exceed the actual cost of the proposed improvement; hence, so long as it is not known that such assessment is too large no one would be permitted by the County Court, either when confirming the assessment or in rendering the judgment upon which the lands are to be sold, to interpose as a defense the mere possibility that the assessment may ultimately prove larger than is needed.

But, from the moment that it clearly appears there is an excessive levy, either from letting the contract for the pro-

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posed work, or otherwise, we think such excess should not be collected, and becomes a legal defense, *pro tanto*, which the County Court should recognize, as, arising at the time, it can be shown in the manner above stated that the levy is excessive and unnecessary.

It does not appear from the bill whether final judgment had been rendered at the time of filing the bill, or not, although from the time of its filing we should infer that such judgment had not been rendered, and if so, appellee had a complete remedy at law, and would have no standing in a court of equity.

The decree of the Circuit Court was erroneous, and will be reversed and the cause remanded.

Reversed and remanded.

MEMORANDA:

SOPHIE COHEN ET AL., IMPL'D, ETC., v. JAMES N.
CRANDALL ET AL.

[Opinion filed July 27, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon.
JOHN C. BAGBY, Judge, presiding.

Messrs. PINCKNEY & TATGE, for appellants.

Mr. LEVI SPRAGUE, for appellees.

Per Curiam. Mechanic's lien—Decree for material-men,
affirmed on evidence.

VILLAGE OF HYDE PARK v. OLIVE J. MARSH, USE, ETC.

[Opinion filed July 27, 1887.]

APPEAL from the Superior Court of Cook County.

Mr. HENRY V. FREEMAN, for appellant.

Mr. CONSIDER H. WILLETT, for appellee.

Per Curiam. The facts being identical, judgment reversed
in conformity with the opinion in Village of Hyde Park v.
Corwith, 12 N. E. Rep. 238.

ALFRED H. BLACKALL ET AL., SUCCESSORS, ETC., IMPL'D.
ETC., V. CHARLES H. HAYDEN.

[Opinion filed July 27, 1887.]

APPEAL from the Circuit Court of Cook County; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MORTON CULVER and GEO. L. THATCHER, for appellants.

Per Curiam. Mechanic's lien—Decree for material-men, affirmed on the evidence.

E. N. HURLBUT V. LEON WEIL ET AL.

[Opinion filed July 27, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. D. BLACKMAN and NOLAN & TAYLOR, for appellant.

Messrs. PAYNE, PORTER & RUSSELL, for appellees.

Per Curiam. Action for damages on injunction bond—Attorney's fees—Allowance of \$150—Conflict of evidence—Affirmed.

WILLIAM T. BURGESS V. ALPHEUS C. BADGER ET AL.

[Opinion filed July 27, 1887.]

IN ERROR to the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. WILLIAM T. BURGESS, in person, plaintiff in error.

Messrs. JOHN WOODBRIDGE and LYMAN & JACKSON, for defendants in error.

Per Curiam. Partnership to prosecute certain suits involving estate of bankrupt, and to advance costs and expenses—Proceeding in equity touching nature and extent of agreements, and for an accounting—Decree affirmed as supported by the evidence, there being no substantial error of law.

EDWARD G. ASAY V. MARSHALL J. ALLEN ET AL.

[Opinion filed July 27, 1887.]

APPEAL from the Circuit Court of Cook County.

Messrs. ASAY, ASAY & RICE, for appellant.

Mr. L. S. HODGES, for appellees.

Per Curiam. Account of trustee—Interest—Computation with annual rests, following *Ogden v. Larrabee*, 57 Ill. 389.

SOLOMON VEHON V. BENJAMIN LINDAUER ET AL.

[Opinion filed August 3, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. HOFHEIMER & ROSENBERG, for appellant.

Messrs. TENNEY, BASHFORD & TENNEY, for appellees.

Per Curiam. Attachment—Issue on answers of garnishees—Verdict against garnishees, held to be supported by the evidence.

M. M. ALLEN V. WILLIAM HAFNER ET AL.

[Opinion filed August 3, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. A. VAN BUREN, for appellant.

Messrs. McELHERNE & CUMMINGS, for appellees.

Per Curiam. Affirmed, there being no error in law and the verdict of the jury being conclusive as to the question of fact.

MOSES FOLEY ET AL. V. ADAM REIPLINGER, ADMINISTRATOR, ETC.

[Opinion filed August 3, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. GARDNER, McFADON & GARDNER, for appellants.

Messrs. McGAFFEY & TURNES, for appellee.

Per Curiam. Decree dissolving injunction and dismissing the complainants' bill, affirmed.

RAND, McNALLY & Co. v. E. P. DONNELL.

[Opinion filed August 3, 1887.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. JAMES R. MANN, for appellant.

Messrs. G. W. & J. T. KRETZINGER, for appellee.

Per Curiam. Indebitatus assumpsit—Trial by court—Judgment for plaintiff—Evidence being conflicting, judgment affirmed.

THE BELLEVILLE DISTRICT FAIR ASSOCIATION V. W.
F. NOETLING, FOR USE, ETC.

[Opinion filed October 5, 1887.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. H. CANBY, Judge, presiding.

Messrs. DALE & BRADSHAW and WILLIAM WINKELMANN, for appellant.

Mr. EDWARD L. THOMAS, for appellee.

PILLSBURY, J. Garnishment—Judgment against garnishee, affirmed upon the evidence.

WILLIAM D. MESSINGER V. HARLAN P. TRACY.

[Opinion filed November 23, 1887.]

IN ERROR to the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. J. A. SLEEPER, for plaintiff in error.

Messrs. FLOWER, REMY & HOLSTEIN, for defendant in error.

Per Curiam. Promissory notes—Whether accommodation paper—Conflict of evidence—Judgment affirmed.

**BENJAMIN BERNSTEIN V. MOSES BERNSTEIN, FOR USE,
ETC.**

[Opinion filed December 7, 1887.]

APPEAL from the County Court of Cook County; the Hon
RICHARD PRENDERGAST, Judge, presiding.

Mr. H. B. STEVENS, for appellant.

Mr. B. M. SHAFFNER, for appellee.

Per Curiam. Action against appellant as surety on appeal
bond—Signature by mark—Denial of genuineness—Conflict
of evidence—Affirmed.

JENNIE C. VALLETTE V. JOHN T. PERIE ET AL.

[Opinion filed December 14, 1887.]

IN ERROR to the Superior Court of Cook County; the Hon.
JOHN P. ALTGELD, Judge, presiding.

Mr. F. J. GRIFFIN, for plaintiff in error.

Messrs. H. C. BENNETT and W. A. PHELPS, for defendants
in error.

Per Curiam. Excessive judgment—*Remittitur*—Judg-
ment as reduced, affirmed, appellees to pay costs in this court.

INDEX.

ACCOUNTING—See ATTORNEYS, 1.

1. Upon a bill for an accounting, the adjustment of rights and claims and the division of certain trust funds, the proceeds of the interest of the parties in a corporation of which they were the promoters, this court holds that the evidence sustains the decree of the court below. *Dunham v. Laflin*, 146

ACTIONS—See INSURANCE, 6; LIS PENDENS, 2; MALICIOUS PROSECUTION, 1, 2; NEGOTIABLE INSTRUMENTS, 9; PRACTICE, 6.

ADMINISTRATION.

1. Upon an appeal by an executor from a judgment against an estate on a claim for work and labor, this court declines to interfere with the findings of the jury, no errors of law being raised. *Griffin v. Kehrer*, 243

2. In an action by an administrator on a note, it is held: That the wife of the defendant is incompetent to prove a contract between him and the deceased for the boarding of the latter's parents, although she did the work and kept the defendant's accounts; that the evidence does not sustain the contract alleged in the plea of set-off; and that an instruction touching the Statute of Limitations, if erroneous, could not have injured the defendant. *Gifford v. Wilkins*, 367

3. After the settlement of an estate the correctness of the administrator's final account is presumed. Where a bill is filed to impeach such an account the burden of proof is upon the complainant. *Eckle v. Clark*, 495

4. Where a claim against an estate is filed in the Circuit Court in time and is continued by agreement until the final determination of another case, the clerk in the meantime omitting it from the docket, the court does not lose its jurisdiction and may re-instate the claim on proper motion and notice although such motion is not made immediately after such other case is determined. *McCall v. Lee*, 585

5. Where such a claim has been filed by an administrator within the time limited by statute, the court may subsequently allow the substitution, by way of amendment, of the party interested, in place of the administrator, as claimant, the real claimant and the basis of the claim remaining the same. *Id.*, 585

6. In allowing a claim against an estate the Circuit Court may leave the classification thereof to the County Court, which directly supervises the administration. *Id.*, 58.

ADMINISTRATION. *Continued.*

7. This court declines to interfere with the findings and judgment of the court below, allowing a claim against an estate for the value of certain personal property turned over to the deceased under a special agreement creating a life estate with limitation over in remainder. *Id.*

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ADMIRALTY—See JURISDICTION, 5, 6.

1. In an action to recover damages caused by a collision on the Mississippi River near the Missouri shore, between a steam ferry-boat owned by the defendant and the plaintiff's flat-boat, it is *held*: That the court properly excluded evidence of the common law of Missouri, touching contributory negligence; that, from the instructions given, when taken together, the jury could not have concluded that the defendant was absolutely liable, from the mere fact that the collision occurred; and that the evidence sustains the verdict for the plaintiff. *Wiggins Ferry Co. v. Reddig*,

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AFFIDAVIT OF CLAIM.

1. Sec. 34, Chap. 79, R. S., providing for the filing of an affidavit of plaintiff's claim, does not authorize the Circuit Court to permit the filing of such an affidavit after an appeal taken from a justice so as to confer upon the plaintiff the right to a default against the defendant and dismissal of his appeal for the mere want of an affidavit of merits. *Mason v. Mandl*,

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AGENCY—See COMMISSION MERCHANTS; EVIDENCE, 5; MECHANIC'S LIEN, 1; TRUSTS, 1.

1. An agent is entitled to his commissions only upon a due and faithful performance of all the duties of his agency. *Harvey v. Cook*,

134

2. In an action to recover commissions for procuring certain advertising contracts, it is *held*: That the undertaking of the plaintiff was to procure contracts of a particular description to be signed by persons of a definite description; that the burden of proof was upon him to show performance; that the reception by the defendants of the papers in question, without inquiry as to the genuineness of the signatures, did not relieve the plaintiff from the burden of proof; that certain instructions were defective; and that the defendant had the right under the general issue to show gross misconduct, fraud, negligence and unskillfulness by the plaintiff in the performance of his duties as agent. *Id.*,

134

3. Where a principal accepts and retains the proceeds of a note, knowing that it was transferred by his agent upon an unauthorized indorsement, he thereby ratifies such indorsement. *Baer v. Lichten*,

311

4. A bond given to an insurance company by an agent to secure the faithful performance of his duties, including an account of all sums of moneys, goods, notes, valuables and other property coming into his hands, does not cover advances made to him by the company. *Burlington Ins. Co. v. Johnston*,

565

AGENCY. *Continued.*

5. In the case presented, it is *held*: That the bond in question had exclusive reference to the conduct of certain appointees as special agents and that the sureties are not bound for individual and personal indebtedness of the agents to the company on account of transactions outside of the contract. *Id.*, 565

ALIMONY—See DIVORCE; SEPARATE MAINTENANCE, 1.

AMENDMENT—See ADMINISTRATION, 5; PRACTICE, 4.

ANIMALS—See MUNICIPAL CORPORATIONS, 10, 11; RAILROADS, 14.

APPEAL AND ERROR—See ADMINISTRATION, 1; INJUNCTIONS, 3; PRACTICE, 4, 5, 6, 12.

1. Where the plaintiff fails to make out a cause of action, error in the instructions affords no ground for reversal. *Johnson v. Chicago*, 26

2. The correctness of the action or rulings of the trial court will always be presumed in the absence of anything in the bill of exceptions, or record proper, showing the contrary. *Chicago City Ry. Co. v. Duffin*, 28

3. In an action to recover rent, it is *held*: That, as the bill of exceptions fails to show that any exception to the finding or judgment for defendant was taken, or motion for a new trial made, neither the sufficiency of the evidence nor an objection to the form of the judgment can be raised in this court. *Weaver v. Singer Mfg. Co.*, 43

4. In the absence of anything to the contrary, appearing in the bill of exceptions, it will be presumed that the verdict as set out in the record was returned in open court and in proper form. *Mattson v. Borgeson*, 79

5. The finding of the trial Judge, sitting in the place of a jury, must be taken by this court to be conclusive of questions of fact as to which the evidence is conflicting. *American F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 149

6. An objection to the admission of an account book in evidence can not be first raised in this court. *Smith v. Forth*, 198

7. Where no errors are assigned upon the record this court may decline to consider the case. *Obermark v. People*, 259

8. The instructions and a motion for a new trial are no part of the record unless incorporated in the bill of exceptions. *Id.*, 259

9. Where the evidence is conflicting and the record discloses no error in the instructions, admission of improper evidence, nor misconduct or prejudice of the jury, this court will not interfere with the verdict. *Mitchell v. Hughes*, 308

10. This court declines to consider an objection, first raised in the brief for appellant, that the bill of exceptions which appears in the record, is not marked filed by the clerk of the court below. *Id.*, 308

11. Where a motion to dismiss the appeal has been overruled it can not afterward be renewed. *Bingham v. Brumback*, 332

12. Upon a motion to dismiss the appeal on the ground that the transcript of the record was not filed in time in this court, the date of

APPEAL AND ERROR. *Continued.*

adjournment of the Circuit Court can not be shown by affidavit or certificate of the clerk of that court. The day of such adjournment can only be shown by an authenticated copy of the order of adjournment.

Id., 332

13. In an action by an employe against his employer to recover damages for a personal injury, it is *held*: That the questions of fact involved must be considered as settled in favor of the plaintiff by the verdict of the jury, the evidence being conflicting; that there was no error in giving and refusing instructions; and that there was no manifest error in overruling the motion in arrest of judgment. *Moline Plow Co. v.*

Anderson, 364

14. Where the questions involved are mainly of fact and the evidence is conflicting, this court will not interfere unless some substantial error has intervened. *Bonnet v. Gladfelt*, 533

15. Where it is necessary for the appellee to file an additional abstract in this court and the decree is affirmed, the costs thereof will be taxed against the appellee. *Caswell v. Caswell*, 543

16. This court may decline to consider whether the court below improperly refused instructions asked, where the abstract does not contain those given. *Fisher v. Ham*, 601

17. Where there is a sharp conflict in the evidence this court will not interfere with the verdict of the jury, unless there is some substantial error in the record which probably contributed to the result. *Bainter v. Lawson*, 634

18. Where error has intervened in the trial of a cause, the judgment will be reversed, unless it appears that such error has not affected the result. *Hunter v. Harris*, 67

19. Where the evidence is conflicting and the jury do not appear to have been influenced by prejudice or passion, the court will not interfere with the verdict. *Winslow v. Bloomington*, 647

ARBITRATION—See MECHANIC'S LIEN, 1.

1. Either party to a submission may, at any time before an award, revoke the authority of the arbitrators. The institution of a suit before award by one of the parties, the cause of action being the same subject-matter, revokes by implication the agreement to arbitrate. *Paulsen v. Manske*, 95

ARREST OF JUDGMENT—See APPEAL AND ERROR, 13.

ASSAULT AND BATTERY.

1. In an action of trespass for assault and battery this court finds no error in the instructions, and declines to interfere with a verdict for \$1,000 as excessive, the question involved, in view of the conflict of evidence, being for the jury. *Harrison v. Ely* 524

ASSIGNMENT.

1. A promissory note and warrant of attorney given for a *bona fide* indebtedness before the maker has decided to make a general assignment, creates a valid preference, although given and taken subject to

ASSIGNMENT. *Continued.*

an informal agreement on the part of the maker to notify the holder, if he becomes financially embarrassed, and although he acts upon such agreement after he has decided to make the assignment. *Hanford Oil Co. v. First Nat. Bk.*, 141

2. Until he has made up his mind to make an assignment, a debtor retains the dominion over his property and may sell, mortgage or pledge it, or create a lien upon it by confessing a judgment in favor of a *bona fide* creditor. *In re Geohegan*, 157

3. A preference is given to a creditor, so far as the debtor is concerned, not by entry of the judgment but by the execution of the warrant of attorney. If that instrument is given at a time when the debtor may lawfully prefer a creditor, the preference is valid. *Id.*, 157

4. Under the statute of this State the creditor will be protected if he, in fact, succeeds in perfecting his lien before the assignment becomes operative. Knowledge of the insolvency of his debtor, or of his intention to make an assignment, or of his being actually engaged in the execution of such instrument, can not deprive him of his preference, if he, in fact, succeeds in obtaining one. *Id.*, 157

5. Mere non-action on the part of the debtor until the creditor has perfected his lien, does not make the procuring of such lien his act. The statute imposes upon him no duty of diligence to defeat the priority of creditors who hold valid warrants of attorney. *Id.*, 157

6. Upon a petition to have certain executions against the property of an insolvent debtor vacated and to have said executions and the judgments on which they were issued declared to be a part of the general assignment, it is *held*: That there is no evidence of such active cooperation on the part of the debtors in the entry of the judgments by confession as to make them their acts; that the liens are therefore valid; and that they do not constitute an illegal preference within the meaning of the statute. *Id.*, 157

ATTACHMENT—See MISTAKE, 1.

1. Shares of stock in a corporation are not subject to attachment under the statute of this State. *Rhea v. Powell*, 77

ATTORNEYS—See CONTRACTS, 1; SET-OFF, 1.

1. Upon a bill, against an attorney, for an accounting, it is *held*: That the decree dismissing the bill for want of equity was warranted by the evidence; that it was entirely proper for the defendant to employ his law partner to collect certain claims belonging to the complainant; that the failure of the defendant to preserve a memorandum from which he could give a detailed account of said claims upon demand, was not such negligence as should render him liable to account on the basis of a wilful default; that he was only chargeable with the actual amount collected by him or his agent; that he was properly allowed credit for the reasonable value of the services rendered by him or his agent in collecting or attempting to collect said claims, their collection not being within a certain special agreement to collect and remit the proceeds of certain notes, in lieu of which they were taken; and that, if the evi-

ATTORNEYS. *Continued.*

dence did not fairly warrant the finding of the master as to the value of said services, the appellant could not first raise the objection here. *Singer v. Steele*, 58

BANKS.

1. Under the charter of the Union Bank of Quincy its stockholders are individually liable to the amount of their stock for all debts of the corporation. *Root v. Sinnock*, 537

BILLS OF EXCEPTIONS—See APPEAL AND ERROR, 2, 3, 4, 8, 10, 16.

1. The bill of exceptions is considered a pleading of the party alleging the exception; and, when liable to the charge of ambiguity, uncertainty or omission, it is construed most strongly against the party who prepared it. *Chicago City Ry. Co. v. Duffin*, 28

BILLS OF REVIEW—See REMOVAL OF CAUSES.

1. Where the proof of fraud is clear and cogent, and convincing reasons are given for the delay, mere lapse of time does not bar a bill of review to impeach a former decree for fraud. *Caswell v. Caswell*, 548

2. A decree may be attacked for fraud in its procurement after the three years, limited in Sec. 19, Chap. 22, R. S., and after the five years allowed for suing out a writ of error, if sufficient reasons are given for the delay. *Id.*, 548

BONDS—See AGENCY, 4, 5; DRAM SHOPS, 2; EVIDENCE, 3; INJUNCTIONS, 4; TRUSTS, 1.

1. In an action against the sureties on a school treasurer's bond, it is *held*: That certain amounts objected to were properly included in the judgment; that the date of a certain receipt is not conclusive as to the time of payment; and that the liability of the principal was established by his receipt to the former treasurer. *Scheik v. Trustees of Schools*, 369

BRIDGES.

1. The Commissioners of Highways have the exclusive power to determine when a necessity exists for constructing a bridge and the kind of bridge required, and to decide whether the conditions exist which entitle the town authorities to call for county aid. *Board of Supervisors v. People*, 410

2. The commissioners' estimate of probable cost of a proposed bridge is not a part of the "official business" of the board, which is required to be done at a regular or special meeting, or of the "official acts and proceedings" which are required to be kept in its record book. *Id.*, 410

3. The law does not require, in all cases other than those of an emergency arising from sudden destruction or serious damages, that the County Board shall actually appropriate from the county treasury, a sum sufficient to meet one half the expense of a proposed bridge before it can be built or the contract therefor let by the commissioners. *Id.*, 410

BRIDGES. *Continued.*

4. Where it appears, upon a petition for *mandamus* to compel a County Board to make an appropriation from the County Treasurer of a sum sufficient to meet one-half the expense of a proposed bridge, that the statutory conditions precedent have been substantially complied with, the writ will be awarded. *Id.*, 410

5. Upon a petition for *mandamus* to require the Board of Supervisors to appropriate half the cost of a bridge, the inquiry is not confined to the case made before the Board. *Board of Supervisors v. Town*, 560

6. Two towns may jointly petition for county aid under Sec. 19, Chap. 121, R. S. *Id.*, 560

7. Towns which have adopted the "labor system," as to road taxes may claim county aid under the statute, the levy contemplated by section 19 not being confined to a money levy. *Id.*, 560

CARRIERS.

1. A common carrier, receiving goods to carry, marked to a destination beyond its line, is bound, under an implied contract, to carry and deliver at the place marked. But this common law liability may be restricted by contract fairly made. *Ohio & M. R. R. Co. v. Emrick*, 245

2. It is a question for the jury whether the terms of a receipt or bill of lading limiting the carrier's liability to its own line was fairly made, understood and assented to by the consignor. *Id.*, 245

3. The consignor of goods intrusted to a common carrier may maintain an action for a failure to carry and safely deliver, the contract for transportation being with him. *Id.*, 245

4. In the case presented, it is *held*: That the evidence proves ownership of the goods in question in the consignor; that upon its own construction of the contract, the burden of proof was upon the defendant to show a safe carriage to the terminus of its line, and a delivery to a connecting line; and that the evidence fails to show such delivery. *Id.*, 245

5. Everything is negligence in a carrier that the law does not excuse. A general allegation of negligence is, therefore, sufficient to sustain a recovery. *East St. Louis Connecting Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 279

6. Where a common carrier of cars receives loaded cars to be delivered to the consignee and returned when unloaded, its liability as a common carrier continues until their safe return. *Id.*, 279

7. The common law imposes no duty upon common carriers to charge a higher rate for transporting goods a longer distance than like goods a shorter distance. But at common law such carriers are not permitted to charge extortionate rates. *Illinois & St. L. R. R. & Coal Co. v. Beaird*, 322

8. In the case presented, it is *held*: That the declaration does not sustain the recovery, there being no averment of unjust discrimination nor that the rates charged plaintiffs were extortionate. *Id.*, 322

CERTIORARI—See DRAINAGE, 3.

1. The common law writ of *certiorari* is not a writ of right and whether it will be granted especially as to a private person, is largely a matter of discretion. *Lees v. Drainage Commissioners*, 488

COMMISSION MERCHANTS.

1. Where produce is shipped to commission merchants to be sold in their market, there is an implied understanding that the business shall be done according to the local usage and custom. *Blandford v. Wing Flour Mill Co.*, 596

2. A commission merchant, who has made advances on flour consigned to him on the presumption that it was sound, may protect himself by selling it at the best advantage when it has been found to be unsound, if the consignor fails to secure him against loss. He may also recover from the consignor the difference between the amount realized and the amount advanced by him. *Id.*, 596

CONTRACTS—See AGENCY, 2; INSURANCE, 5, 6; MASTER AND SERVANT, 1, 2; MUNICIPAL CORPORATIONS, 8, 9; NEGOTIABLE INSTRUMENTS, 5, 6; PARTNERSHIP, 6; PERSONAL INJURIES, 2; PRACTICE, 7; SCHOOLS, 1, 2, 4.

1. A stipulation by which a debtor agrees to pay the fees of his creditor's attorney, in case of legal proceedings to collect his debt, rests upon a good and valuable consideration, and will be sustained. *Weigley v. Matson*, 178

2. In an action of assumpsit for labor and materials by a contractor who had been displaced by the defendants before the completion of their building, it is *held*: That there was no error in allowing the plaintiff to refer to a memorandum of items and charges taken from his books; that the court properly refused to allow the cross-examination of a certain witness to extend to a matter not covered by the examination in chief; that an objection calling for an expression of opinion by another witness was properly sustained; that there was no abuse of discretion by the court in refusing the application to recall a witness, after a day or more, to make an additional statement in regard to a matter about which he was interrogated but could give no definite reply when first examined; that there was no error in giving and refusing instructions; and that the charge of misconduct of a juror is not sustained. *Bonnet v. Gladfelt*, 533

CONTRIBUTION—See TRUST DEEDS, 2.**CORPORATIONS**—See ACCOUNTING, 1; ATTACHMENT, 1; BANKS, 1; EVIDENCE, 4.**COSTS**—See APPEAL AND ERROR, 15.**CRIMINAL LAW**—See DRAM SHOPS, 3; INFORMATION, 1; JURISDICTION, 7.

1. An indictment charging the defendant with having altered and defaced a ballot legally voted at an election for township officers, after it was put into the ballot box, is sufficient to sustain a conviction. *Binger v. People*, 310

DAMAGES—See ASSAULT AND BATTERY, 1; DRAINAGE, 5; INJUNCTIONS, 1, 2, 3; MUNICIPAL CORPORATIONS, 3, 7; RAILROADS, 8, 11, 12.

DEDICATION—See RAILROADS, 2.

DEFAULT.

1. The default of a defendant in a bill in equity is an admission of facts alleged in the bill, but not of the pleader's conclusions from, such facts. *Cramer v. Bode*, 219

DIVORCE.

1. A common law marriage is a marriage "contracted and solemnized" within the meaning of our statute authorizing divorce. *Bowman v. Bowman*, 165
2. To constitute a marriage *per verba de presenti* no particular words are necessary. It is sufficient if what is done and said evidences a present assumption by the parties of the marriage *status*. *Id.*, 165
3. Where, in an application for alimony *pendente lite*, the fact of marriage is practically the only point in issue, the proof required should only extend to probable cause, or a fair probability that the petitioner will maintain her allegation. *Id.*, 165
4. A married woman may be an actual resident of this State though she has no domicile here, and if while she is such actual resident, the offense which supplies the ground of divorce is committed, thereafter her actual residence becomes her separate and legal domicile. *Id.*, 165
5. In the case presented, it is *held*: That the evidence of a common law marriage furnishes proof sufficient to authorize the court to grant alimony and suit money *pendente lite*; and that the court below had jurisdiction under the statute. *Id.*, 165
6. The exercise of the power to make allowances to the wife, pending a bill for divorce, for the support, during the litigation, of herself and the children in her custody and care, and for the payment of her solicitor's fees and other expenses of suit, is within the judicial discretion of the court wherein such bill is pending. In such cases this court will not interfere, unless there has been an abuse of discretion. *Wooley v. Wooley*, 431
7. The power to require the husband to pay alimony *pendente lite*, is not affected by the statutory right of the wife to control her separate property and to enjoy her own earnings. *Id.*, 431
8. The allowance of alimony *pendente lite* does not depend upon the wife's absolute right to a divorce. She is only required to show probable ground for a divorce. The court will not, upon a preliminary motion and upon *ex parte* and contradictory affidavits, undertake to determine the issues presented by the pleadings. *Id.*, 431
9. Under some circumstances, a gross sum for temporary alimony and support may be allowed. *Id.*, 431
10. A decree of divorce procured through fraud, by one who has since remarried and has had children by such subsequent marriage, may be set aside upon a bill of review filed after a delay of fourteen years, if clear and convincing reasons appear for the delay. *Caswell v. Caswell*, 548

DOGS.

1. In an action to recover damages for killing a dog, it is *held*: That the killing was justifiable, the dog having been found late at night destroying the defendant's property on his premises; and that as the dog was a trespasser, the owner can not complain that the plaintiff's building was insecure. *Dunning v. Bird*, 270

DOMICILE—See DIVORCE, 4.

DRAINAGE.

1. Under Sec. 17, Chap. 42. R. S., the jury may off-set benefits against damages for land taken for drainage purposes. *Winkelmann v. Drainage District*, 242

2. Under the Acts of 1879 and 1881, the boundaries of a drainage district might be changed by the Commissioners without a change of the petition and without affidavits showing the existence of the jurisdictional facts required. *Lees v. Drainage Commissioners*, 488

3. Upon a writ of *certiorari* to test the legality of the organization of a drainage district, it is *held*: That said district may have been properly organized and its boundaries subsequently changed by the Commissioners, although the affidavits of two signers of the petition were not filed to show the jurisdictional facts required, Sec. 5 of the Act of 1879 being permissive and not mandatory; that Sec. 78 of the Act of 1885 legalized the acts and proceedings of the Commissioners in establishing the district, informality alone being complained of; and that appellant, as a signer of the petition, is estopped from questioning the legality of the organization of the district. *Id.*, 488

4. The curative act of 1885 must be liberally construed to promote drainage and the reclaiming of wet and overflowed lands. *Id.*, 448

5. It is within the power of the Commissioners to change the boundaries of a drainage district so as to exclude lands already included or to include additional lands. They may also permit additional signatures to the petition. *Doyle v. Baughman*, 614

6. In an action of trespass against certain drainage Commissioners and contractors, it is *held*: That a defect in the final order organizing the district was cured by the Act of 1885; that the Commissioners were such *de facto* officers as to afford protection to the contractors and their employes; that it must be presumed that the plaintiff's entire damages, "consequent upon the construction of the proposed work," were considered by the jury in the condemnation proceedings; and that the verdict for the plaintiff is against the law and evidence. *Id.*, 614

DRAM SHOPS—See INTOXICATING LIQUORS; MANDAMUS, 1.

1. In an action brought by a widow and her minor children against saloon keepers, to recover damages for causing the death of her husband and their father, it is *held*: That an instruction which does not require the jury to find that the death was caused by the alleged intoxication, is erroneous; that this error is not cured by other instructions which fairly submit that issue to the jury; that an instruction as to exemplary damages, in view of the evidence, was improperly given; that, to warrant

DRAM SHOPS. Continued.

such an instruction, there must be something beyond the mere fact of the sale of intoxicating liquors and resulting damages; and that there was not sufficient evidence against one of the defendants to justify the verdict against him. *Murphy v. Curran*, 475

2. In an action brought on the bond of certain liquor dealers to recover damages for causing the plaintiff's husband to become a drunkard and thereby causing his death while intoxicated, it is *held*: That an instruction from which the jury must have understood that the defendants were not liable, although the deceased was killed in consequence of being drunk from liquors furnished in whole or in part by the defendants, is erroneous; that the declaration, charging that he was killed by an engine and train of cars, would sustain a recovery if any part of the train struck and killed him; and that the admission of the opinions and surmises of certain witnesses, who saw the deceased after his death, as to the cause of death, was improper. *People v. Brumback*, 501

3. A suit before a Justice of the Peace under Sec. 12 of the Dram Shop Act, to recover a fine for selling liquor to a minor, is a civil action and not a criminal prosecution. *Proctor v. People*, 599

4. Upon appeal in such an action the Circuit Court may instruct the jury that a clear preponderance of evidence is sufficient to authorize a recovery by the people. *Id.*, 599

5. In suits under Sec. 9 of the Dram Shop Act the plaintiff may proceed against any and all persons jointly or severally who may have caused the intoxication in whole or in part, without reference to whether they have equally contributed to the injuries complained of. They stand upon the same footing as persons engaged in a joint tort, each being liable for the entire damage. *Buckworth v. Crawford*, 603

6. Upon a motion for a new trial in such an action, the court may enter judgment against one defendant after permitting the plaintiff to dismiss as to another. *Id.*, 603

EJECTMENT—See MUNICIPAL CORPORATIONS, 14.

ELECTIONS—See CRIMINAL LAW, 1; OFFICERS, 2.

1. The general laws of the State in regard to elections apply to elections for town officers at elections held under the Township Organization Act. *Binger v. People*, 310

EQUITY—See DEFAULT, 1; JUDGMENTS, 4; JURISDICTION, 2, 3, 4; PRACTICE, 2, 3; TAXES, 3.

ERROR—See APPEAL AND ERROR.

ESTOPPEL—See INSURANCE, 4; HUSBAND AND WIFE, 1; MALICIOUS PROSECUTION, 3; REAL PROPERTY, 6; SCHOOLS, 5.

EVIDENCE—See ADMIRALTY, 1; APPEAL AND ERROR, 6, 9; DRAM SHOPS, 2, 4; JUDGMENTS, 1, 2; LANDLORD AND TENANT, 8, 9; MECHANIC'S LIEN, 1; MUNICIPAL CORPORATIONS, 3, 6; NEGOTIABLE INSTRUMENTS, 7, 9, 14, 16; PERSONAL INJURIES, 4; RAILROADS, 3; REPLEVIN, 1; TRUSTS, 1.

EVIDENCE. *Continued.*

1. Where the question of license or qualification of a physician arises collaterally in a civil action between third parties, the license or due qualification of the physician under the statute will be presumed. *Chicago v. Wood*, 40

2 Under the rule that the evidence must correspond with the allegations and be confined to the point in issue, all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact in dispute, is inadmissible. *Drabek v. Grand Lodge*, 82

3. In an action against the sureties on the bond of the secretary of a secret society, it is *held*: That certain admissions by the principal on the bond, although made subsequently to the acts to which they relate, were properly admitted to charge the defendants, such admissions being against the interest of the principal and he having since died; that a letter of the principal containing collateral matters, written in extenuation of his conduct, was improperly admitted; and that, if said principal on said bond was a defaulter at the close of his previous term of office, and the president of said society, with knowledge of such fact, falsely represented to the defendants that his accounts were correct, and thereby induced them to deliver such bond in question, it is void and will not sustain the action. *Id.*, 82

4. A copy of the articles of consolidation between two or more corporations, duly certified under the seal of the Secretary of State, is *prima facie* evidence of the existence of the consolidated corporation. *East St. Louis Connecting R. R. Co. v. Wabash, St. L. & P. Ry. Co.*, 279

5. In an action involving an account for board, it is *held*: That the testimony of the plaintiff's wife, to the effect that her husband was absent most of the time and that in his absence she managed the hotel for him, is sufficient proof of her agency to render her a competent witness. *Mitchell v. Hughes*, 308

6. Where proffered testimony tends to prove any of the issues on trial, it should not be excluded, even though it tends to establish a defense not interposed. *Gitchell v. Ryan*, 372

7. The genuineness of a signature can not be proved or disproved on the trial of a cause by comparing it with other signatures admitted to be genuine. *Id.*, 372

8. Possession of a note declared on is evidence tending to show its delivery. The plaintiff may be permitted to show how long he has had possession of the note to aid the presumption arising from such possession. *Hunter v. Harris*, 637

9. In an action by an administrator on a promissory note, alleged to have been made to his intestate, the execution of which is denied, the plaintiff may show that the note existed prior to his appointment, among the other papers of the deceased, and in the place where he usually kept such papers. *Id.*, 637

10. While the evidence must correspond with the allegations and be confined to the point in issue, it is not required that it shall bear directly upon the issue. It is admissible if it tends to prove the issue or

EVIDENCE. *Continued.*

constitutes a link in the chain of proof. It is relevant if it conduces to the proof of a pertinent hypothesis. *Id.*, 637

11. It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable. *Id.*, 637

12. Where the genuineness of a promissory note is in issue, the defendant may show such facts as would exclude the possibility or probability of its execution at the time and place indicated upon its face. *Id.*, 637

13. While the date of a note is *prima facie* evidence of the time of its execution, it is not conclusive. *Id.*, 637

EXECUTION—See MISTAKE, 1; WILLS, 1.

1. Sec. 3, Chap. 77, R. S., authorizes the sale under execution of only such interests as may be disposed of by the debtor himself. *Emerson v. Marks*, 642

FINES—See MUNICIPAL CORPORATIONS, 12, 15.

FORGERY—See NEGOTIABLE INSTRUMENTS, 7.

FORMER ADJUDICATION—See PARTNERSHIP, 3.

FRAUD—See AGENCY, 2; ASSIGNMENTS; BILLS OF REVIEW, 1, 2; DIVORCE, 10; EVIDENCE, 3; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 2; REPLEVIN, 2, 3; SALES, 2, 3; STATUTE OF FRAUDS.

1. It is fraud in law, if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad. *Drabek v. Grand Lodge*, 82.

2. Fraud must be established by evidence so clear and cogent that it leaves the mind well satisfied that the charge is true. *Brown v. Bierman*, 574

FRAUDULENT CONVEYANCES.

1. Where the grantor, after the execution of a voluntary conveyance to members of his family, which is not recorded, is permitted to retain possession as the ostensible owner, such possession is *prima facie* evidence of fraud as against subsequent creditors who have given credit to the grantor upon the faith of his supposed ownership of the property. *Id.*, 237

2. The rule which sustains and upholds family settlements, securing to the husband and father the right to make suitable and proper provision for his wife and children by means of voluntary conveyances, requires such reasonable notice of such conveyances as will prevent the grantor from afterward practicing a fraud upon others. *Id.*, 237

3. In the case presented, it is *held*: That the failure of the grantees to record their deeds, while suffering the grantor to retain possession and control, pay taxes, receive the proceeds of the premises in question and obtain credit on the faith of his supposed ownership, renders their conveyances void as against the complainants, who are subsequent creditors. *Id.*, 237

GAMING—See INSURANCE, 7; NEGOTIABLE INSTRUMENTS, 8, 9, 10.

HIGHWAYS—See BRIDGES; RAILROADS, 3; REAL PROPERTY, 1, 2, 3.

HOMESTEAD.

1. An estate of homestead under our statute may be legally conveyed from the husband to the wife. *Milwaukee Mechanics' Ins. Co. v. Ketterlin*, 188

2. The statute takes the homestead out of the available assets of the debtor for the payment of his debts. The creditor can not, therefore, complain of its conveyance by the debtor to his wife or another. Under the statute the grantee holds, free from all claims of the grantor's creditors. *Boyd v. Barnett*, 199

HUSBAND AND WIFE—See ADMINISTRATION, 2; EVIDENCE, 5; FIRE INSURANCE, 3; HOMESTEAD, 1, 2; JUDGMENTS, 4.

1. Upon a bill filed by creditors of the estate of defendant's deceased wife to subject certain real estate, standing of record in his name, to the payment of their claims, it is *held*: That the complainants have failed to show that the property in question was purchased with the wife's money, or to make out an equitable estoppel; and that the evidence sustains the decree of the court below for the defendant. *Thor v. Oleson*, 132

2. A settlement of property by a husband upon his wife, when he is solvent and the settlement reasonable, can not be attacked by subsequent creditors, unless such settlement was made with a view to future fraudulent indebtedness. *Cramer v. Bode*, 219

3. A light farm wagon is not a family expense within the meaning of Sec. 15, Chap. 68, R. S. *Dunn v. Pickard*, 423

INFORMATION.

1. An information charging the defendant with unlawfully selling intoxicating liquors requires no affidavit. *Obermark v. People*, 259

INJUNCTIONS.

1. Where an injunction has been dissolved, the damages to be allowed in the assessment upon a suggestion of damages, are only such as have resulted from the improper suing out of the injunction. Solicitor's fees must be confined to the proper allowance for services rendered on the motion to dissolve. *Lichtenstadt v. Fleisher*, 92

2. The allowance of solicitor's fees in such cases rests somewhat in the discretion of the chancellor before whom the litigation has proceeded, and unless he has very clearly gone wrong, his discretion will not be interfered with by this court. *Id.*, 92

3. In such a case this court will not reverse merely for the reason that the finding of the court below was for a less sum than the lowest amount fixed by the witnesses. *Id.*, 92

4. Where an injunction enjoining the collection of separate and distinct taxes due to separate and independent corporations is dissolved as to part and sustained as to the remainder of such taxes, there is a breach of the bond. *Willits v. Slocumb*, 484

5. In the case presented, it is *held*: That the breach as to attorney's

INJUNCTIONS. *Continued.*

fees was not well assigned; and that the demurrer to the declaration should have been overruled, the general breach assigned being sufficient to sustain a recovery of at least nominal damages. *Id.*, 484

INSOLVENCY—See ASSIGNMENTS; SALES, 3.

INSTRUCTIONS—See APPEAL AND ERROR, 13, 16; CONTRACTORS, 2; DRAM SHOPS, 1, 2, 4; LANDLORD AND TENANT, 2; MALICIOUS PROSECUTION, 4; MASTER AND SERVANT, 2; MINES, 2; NEGOTIABLE INSTRUMENTS, 4, 7, 8, 9, 14, 16; PERSONAL INJURIES, 4, 7; PRACTICE, 8; RAILROADS, 1, 4, 7, 12, 16; REPLEVIN, 1, 3.

1. An instruction which purports to embrace every element necessary to a recovery, is defective if any material element is omitted. *Harvey v. Cook*, 134

2. It is not error to refuse instructions which correctly state rules of law applicable to the case, when said rules are fully stated in other instructions given at the instance of the same party. *Chicago & A. R. R. Co. v. Dillon*, 204

3. An instruction which defines the legal duty of a steam vessel, in the language of the statute and the decisions, can not be held erroneous, although it may not contain all the law applicable to the case. *Wiggins Ferry Co. v. Reddig*, 260

4. This court will look at the entire charge to see whether the trial court has laid down the law correctly with proper limitations and explanations of abstract propositions therein contained. *Id.*, 260

5. An instruction which directs attention to elements of liability not specified in the declaration is fatally defective. *Consolidated Coal Co. v. Yung*, 255

6. The trial court may properly refuse to give an instruction which is argumentative, and the substance of which is given in another instruction. *Gitchell v. Ryan*, 372

7. The court may properly refuse to give an instruction which states an abstract proposition of law. *Moline Plow Co. v. Anderson*, 364

8. It is proper to refuse an instruction which is substantially identical with another which is given. *Chicago, R. I. & P. R. R. Co. v. Brisbane*, 464

9. Instructions which state the law differently in regard to a particular matter or state of circumstances, are repugnant, and no repetition of the correct instruction can cure the error in the other. *Murphy v. Curran*, 475

10. Where the evidence is sharply conflicting, the instructions must accurately state the law of the case. *People v. Brumbach*, 501

11. An instruction which calls special attention to some particular part or parts of the evidence is erroneous. *Id.*, 501

12. It is error to give an instruction which is not based upon the evidence. *Id.*, 501

INSURANCE.

1. Upon a bill filed to wind up a mutual benefit association and distribute its assets, and a cross-bill claiming said assets on a death claim

INSURANCE. *Continued.*

against the association, it is *held*: That the fund was a trust fund for the payment of mortuary benefits; that, as there was a trust purpose to which it could be applied, the directors could not apply such fund to the payment of advances made by themselves to discharge a prior death claim for which they might have made an assessment; that their advances made them only ordinary creditors; that the claim of the cross-complainant was not premature, the bill being to wind up the corporation; and that the court below had full jurisdiction of the entire subject-matter. *Wilber v. Torgeson*, 119

2. In an action on a policy of fire insurance, it is *held*: That the building in question was at no time within the period covered by the policy vacant or unoccupied; that the temporary stoppage or suspension of the operation of the factory for the purpose of making repairs and alterations was within the privilege granted by the policy; and that the judgment for the plaintiff is supported by the evidence. *American F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 149

3. The conveyance of a homestead by a husband to his wife, is such a change in the title as will avoid a policy of fire insurance containing a stipulation that any change in the title without the consent of the company shall have that effect. *Milwaukee Mechanics' Ins. Co. v. Ketterlin*, 168

4. In an action on a policy of insurance issued upon a stock of goods, it is *held*: That the stipulation signed by the agent of the defendant and attached to the policy by him, regarding the proper and safe keeping of books of purchases and sales and inventories, might be waived by him; that the evidence sustains the finding of the court below that it was so waived; and that the defendant is estopped to claim a forfeiture for the failure of the plaintiff to comply with its conditions. *Niagara F. Ins. Co. v. Brown*, 224

5. The contract of insurance between a mutual benefit association and one of its members will be as fully protected as if made with a stranger. The association can not, without the assent of such member, impose any new condition affecting the contract to his injury. It can not, by subsequent by-law, forfeit any of his rights under the contract. *Northwestern B. and M. Aid Ass'n v. Wanner*, 357

6. In the case presented it is *held*: That the certificate in question was not affected by a subsequent by-law exempting the defendant from liability in cases of suicide; that an action in covenant will lie on the policy; and that the declaration is sufficient. *Id.*, 357

7. Where one insures his life for the benefit of a third person who has no pecuniary interest therein, the question whether the policy is a wagering contract is for the jury. *Bloomington Mut. L. Benefit Ass'n v. Blue*, 518

8. The mere fact that the beneficiary has no pecuniary interest in the life insured, does not render the contract void as against public policy. *Id.*, 518

9. In a case involving the question whether a mutual benefit association, organized under the Act of January 13, 1883, can defend an action

INSURANCE. *Continued.*

on a policy issued for the benefit of one not a devisee or legatee of, nor in any way related to, the insured, on the ground that the contract was *ultra vires*, this court affirms the judgment of the court below, in order to have the question settled by the Supreme Court without delay. *Id.*, 518

INTOXICATING LIQUORS—See DRAM SHOPS; INFORMATION, 1.

1. In a prosecution for selling liquors to a person in the habit of getting intoxicated, it is improper to instruct the jury that, when a person gets intoxicated from three to five times within two years, he is in law a person who is in the habit of getting intoxicated. *Kumman v. People*, 388

2. Whether a person is in the habit of getting intoxicated is a question of fact for the jury. *Id.*, 388

3. There is no rule of law fixing the number of times a person must become intoxicated within a stated period in order to constitute him "a person in the habit of getting intoxicated." It must be shown that he has been frequently intoxicated, and has thereby acquired an involuntary tendency to become so, and that, at the time of the sale complained of, he is in the habit of getting intoxicated. *Birr v. People*, 389

JUDGMENTS—See APPEAL AND ERROR, 3; *Scire Facias*, 1. 4; SET-OFF, 1.

1. The record of a court showing a judgment by confession in open court, imports verity and can not be contradicted by parol evidence. *Weigley v. Matson*, 178

2. Upon a bill to have certain default judgments vacated and set aside, and to enforce an alleged prior lien, it is *held*: That the admission by the complainant that the judgments in question purport to have been entered in open court in term time, is an admission of the existence of conclusive evidence that such judgments were so entered; and that, as the judgments were part of the proceedings of the court in term time, it is immaterial whether the records were actually written up when the executions were issued. *Id.*, 178

3. To entitle a party to a transcript from a Justice to file in the Circuit Court to obtain a lien upon the realty of the judgment debtor, execution must be first issued by the Justice within one year from the rendition of the judgment, and returned *nulla bona*. *Cramer v. Bode*, 219

4. Upon a bill to subject certain real estate, standing in a wife's name, to the lien of a judgment against her husband, it is *held*: That it does not appear from the bill that the lien of the judgment was perfected by the issue of execution within a year from its rendition; that the bill is defective in not showing what proceedings were had before the Justice and certified to the Circuit Court; that the averment of time when the indebtedness accrued, leaves it uncertain whether it was prior or subsequent to the conveyance to the wife; and that the decree is too broad in setting aside the conveyance which is valid as between the parties except as to creditors, if any, who have been hindered or delayed in the collection of their claims. *Id.*, 129

JURISDICTION—See DIVORCE, 5; INSURANCE, 1.

1. Upon appeal from a Justice, if the parties appear and go to trial in the Circuit Court on the merits without objection, the court will have jurisdiction although there is no transcript. *Hanchett v. Williams*, 56

2. The general rule that a court of equity has no jurisdiction to quiet title or remove a cloud upon the title to real estate unless the complainant is in possession, or the land is improved or unoccupied, has certain exceptions. *Holden v. Holden*, 106

3. Where the facts stated in the bill show that the legal title claimed by the complainant is not disputed by the defendant in possession, but that such defendant sets up some equity, not affecting the legal right of possession, which operates as a cloud on the legal title and prevents a sale of the property, equity has jurisdiction, there being no adequate remedy at law. *Id.*, 106

4. A court of equity has jurisdiction where the defendant is in possession of real estate and in default under a contract for purchase. *Id.*, 106

5. Neither Illinois nor Missouri can exercise exclusive jurisdiction over any part of the Mississippi River, nor is either confined in the exercise of its own jurisdiction to the middle thereof. The two States exercise concurrent jurisdiction on the river for all judicial purposes. *Wiggins Ferry Co. v. Reddig*, 260

6. Where a steamer, navigating public waters, does not keep out of the way and a collision occurs with a flat-boat, the former is *prima facie* liable in the common law courts as well as in the courts of admiralty. *Id.*, 260

7. Under the Act of May 21, 1877, the County Court has concurrent jurisdiction with the Circuit Court of appeals from Justices of the Peace in cases arising under the Criminal Code. *Neatherly v. People*, 273

LANDLORD AND TENANT—See PRACTICE, 6.

1. A tenancy from year to year, although commenced under a parol agreement, can only be determined by the statutory notice of sixty days in writing. *Tanton v. Van Alstine*, 405

2. In an action to recover rent under a tenancy from year to year, in the absence of the required notice to determine the tenancy, it is error to instruct the jury that the defendant is not liable unless he actually used and occupied the premises for the year in question. *Id.*, 405

3. The mere occupancy of the entire property by one of two tenants in common does not render him liable to account to his co-tenant for rent. *Boley v. Barutio*, 515

4. The relation of landlord and tenant is not as readily inferred between co-tenants as between strangers, and whether such relation exists is a question of fact for the jury. *Id.*, 515

5. A promise by a co-tenant, occupying the entire property, to pay rent, may be implied. *Id.*, 515

6. Where one occupies the premises of another after receiving notice that he will be required to pay rent, he will be bound to pay such rent. *Id.*, 515

LANDLORD AND TENANT. *Continued.*

7. An error in the admission of evidence, which could not have injured the appellant, is not a sufficient ground for a reversal of the judgment. *Id.*, 515

8. In an action of distress for rent, unless the warrant contains an allegation or charge that the defendant by good husbandry might have made a better crop, evidence to that effect is inadmissible. *Bainter v. Lawson*, 634

9. In the case presented, it is *held*: That the question whether the defendant had notice that the agency of a third person had terminated, was for the jury; that a certain conversation between him and such third person was properly admitted; and that there was no substantial error in giving and refusing instructions. *Id.*, 634

LICENSES—See MANDAMUS, 1; MUNICIPAL CORPORATIONS, 4.

LIFE ESTATE—See ADMINISTRATION, 7.

LIMITATIONS—See STATUTE OF LIMITATIONS.

LIS PENDENS.

1. The plaintiff and defendant in an execution issued, pending a trial of the right of property between the latter as claimant and the judgment creditors of a third person, in goods levied on as the property of such third person, are in such privity of relation that both will be alike bound by a judgment finding the rights of property against the claimant. *Hill v. Reitz*, 391

2. An action does not lie against the Sheriff for failure to levy an execution issued pending the trial of the right of property under the former levy on the property as that of a third person. *Id.*, 391

LUNATICS.

1. A lunatic is liable in a civil action for a tort committed by him. *McIntyre v. Sholtz*, 605

2. In an action to recover damages for the wrongful burning of the plaintiff's barn by the defendant's intestate, it is *held*: That the court below properly refused to permit the defendant to prove that the deceased was a lunatic; and that the evidence sustains the verdict for the plaintiff. *Id.*, 605

MALICIOUS PROSECUTION.

1. There is a distinction between an action for a malicious abuse and a malicious use of civil process, such distinction having reference to the termination of the action in which the process issued. *Emery v. Ginnan*, 65

2. Where there is a just claim in suit, and civil process is maliciously used to arrest the defendant, in order to recover from such malicious use of legal process, it is necessary to prove that it was malicious and without probable cause and that the suit or proceeding was finally determined before action was brought for the injury. *Id.*, 65

3. The termination of the suit or proceeding must be such as does not admit a reasonable cause for prosecution. A termination by compromise or settlement between the parties is such an admission of probable cause by the defendant as will estop him from its subsequent denial. *Id.*, 65

MALICIOUS PROSECUTION. *Continued.*

4. In the case presented, it is *held*: That an instruction, which attempts to enumerate all the elements necessary to sustain plaintiff's cause of action, is fatally defective, because it ignores and excludes from the consideration of the jury certain evidence tending to show a dismissal of the original proceeding as the result of a settlement between the parties; and that another instruction was improperly amended by the court so as to make one part conflict with the other. *Id.*, 65

5. In an action for malicious prosecution, the burden of proof to show want of probable cause is on the plaintiff, and he must make such proof clear and satisfactory. *Gardiner v. Mays*, 286

6. To determine whether there is probable cause for instituting a criminal prosecution, the prosecutor is not required to verify each item of information. It is sufficient if he acts with reasonable prudence and caution. *Id.*, 286

7. Malice may be inferred from want of probable cause, but such an inference is not always warranted. *Id.*, 286

8. In the case presented, it is *held*: That the evidence fails to show want of probable cause; that the question of probable cause is not one of actual guilt, but of honest and reasonable belief of the party prosecuting; and that the evidence did not warrant the jury in finding malice. *Id.*, 286

MANDAMUS—See **BRIDGES**, 4, 5.

1. In an action by school trustees against a municipal corporation to recover "one-half of all money received into the city treasury from dram shop licenses," as provided by the charter of the defendant, it is *held*: That the representative of the defendant was duly authorized to enter its appearance and consent to the rendition of the judgment in question and consent to the order for the writ of *mandamus*; that the court below properly overruled the motion to vacate said judgment and order; and that if, on the return of the writ it appears that the City Council was ordered to do an impossible and illegal act, the court below will doubtless so modify its order as to protect the interests of both parties. *East St. Louis v. Trustees of Schools*, 194

MARRIAGE—See **DIVORCE**.**MASTER AND SERVANT**—See **PERSONAL INJURIES**, 3, 4, 8; **RAILROADS**, 7, 8.

1. Where an employment is at a certain sum per annum, such sum may only be the rate of compensation agreed upon for the time served and not a specification of any particular term of service. *Lynch v. Eimer*, 185

2. Upon appeal from a judgment allowing a claim against an estate, it is *held*: That an instruction in which it was assumed that an employment for \$900 per annum constituted a contract for an entire year, and that a continuance of the employment was governed by such contract, was calculated to mislead the jury; that said instruction also erroneously assumed a first contract for a year; that the jury might consider the original contract in ascertaining what the terms of the new agreement

MASTER AND SERVANT. *Continued.*

were under which the service was continued; that the claimant can not recover for a wrongful dismissal until he has proved a contract for a definite period; and that an objection based on a variance can not be first raised in this court. *Id.*, 185

3. In an action for wages, it is *held*: That the evidence shows that the contract was abandoned by mutual consent, and that there was a settlement between the parties; that the counter-claim of defendant was properly excluded; that there can be no recovery for the full term; that the judgment of the County Court was excessive; and that judgment may be entered in this court for the amount found due by the Justice, with costs before him and the County Court, appellant being allowed costs in this court. *Grannemann v. Kløpper*, 277

MECHANIC'S LIEN.

1. Upon a petition for a mechanic's lien, it is *held*: That the contracts under which the petitioners furnished labor and materials were made with the owners of the land by one who, though acting in his own name, was authorized to act and was in fact acting, not only for himself but as their agent; that certain admissions by the beneficial owner, contained in an agreement submitting the matters in dispute to arbitration, are competent evidence tending to establish the agency, and as such, sufficient to sustain the decree for the petitioners; that a release given by the petitioners to a mortgagee is not available to the owners as a waiver of the liens in question; and that said liens were not affected by the agreement to submit to arbitration, the commencement of this suit having been a revocation of the agreement to arbitrate. *Paulsen v. Manske*, 95

2. In a proceeding to enforce a mechanic's lien on property covered by a trust deed, the holder of the notes secured thereby and the trustee should be made parties defendant, or such holder will not be bound. *Bannon v. Thayer*, 428

3. In the case presented, the evidence shows that the holder of the lien was in possession of facts as to the ownership of the note sufficient to put him on inquiry. *Id* 428

MINES.

1. In an action by an administrator against a coal mining company to recover damages for causing the death of the plaintiff's intestate, the only omission of duty charged by the declaration being a failure to furnish proofs and prop the clod, dirt, slate and other materials so that it would not fall, it is *held*: That the declaration does not show a violation of Sec. 16, Chap. 93, R. S., under which the owner is only required to furnish and send down such props; that the negligence charged does not constitute a cause of action at common law; that an instruction given for plaintiff, which directed the attention of the jury to other and different elements of liability than those alleged in the declaration, was erroneous; and that the motion in arrest of judgment should have been granted. *Consolidated Coal Co. v. Yung*, 255

2. In an action by the owner of certain lands to recover damages

MINES. *Continued.*

caused by the removal of supports in a coal mine, it is *held*: That the record contains evidence which tends to support the plaintiff's declaration and which he is entitled to have passed upon by a jury under proper instructions; and that an instruction given for the defendant, touching the measure of damages and assuming a "general decrease in rents," is fatally defective. *Penn v. Taylor*, 292

MISSISSIPPI RIVER—See ADMIRALTY, 1; JURISDICTION, 5.

MISTAKE.

1. Upon a bill to correct a mistake in the levy of a writ of attachment in a special execution and in a certificate of purchase, so as to include all of certain lots intended to be included, or to require a subsequent purchaser to pay over a part of the purchase money left with him for the redemption from the sale, it is *held*: That the court below improperly sustained a general demurrer; that the complainant was at least entitled to the alternative relief prayed; that said subsequent purchaser holds the money so left in his hands as trustee for the complainant; and that he can claim no exemption in the execution of his trust by reason of his own violation of duty in failing to apply said fund while the right to redeem existed. *Gaunt v. Froelich*, 303

MORTGAGES—See TRUST DEEDS.

1. The right to foreclose a mortgage continues until the debt which it secures is barred. Whatever arrests the running of the Statute of Limitations against the debt, arrests its running against the mortgage. Whatever recognizes the debt as still subsisting, also recognizes the mortgage by which it is secured. *Schifferstein v. Allison*, 294

2. Sec. 11, Chap. 83, R. S., is merely a legislative declaration of the rule previously established by the Supreme Court. *Id.*, 294

3. A mortgage can be enforced against the purchaser of the mortgagor's equity of redemption, at a sale made when the mortgage was upon its face in full force and effect, at any time within ten years from the last payment upon the note secured by such mortgage. *Id.*, 294

4. Where a mortgage, containing a power of sale, was given to secure a promissory note and the note has been assigned, the power can only be executed by the assignee of the note. *Sanford v. Kane*, 504

5. The joinder of a wife in a deed by her husband, merely to release her inchoate right of dower, does not bar her from acquiring an outstanding title and asserting it against her husband's grantee. *Id.*, 504

6. Upon a bill filed to cancel a deed executed under a power of sale contained in a mortgage, and to be permitted to redeem, it is *held*: That the power was improperly executed by one who was not the assignee of the note; that the note was usurious; that the complainant, as one of the makers, can avail herself of the usurious character of the note; and that her interest in the property entitles her to redeem. *Id.*, 504

7. A deed absolute on its face will be considered a mortgage when it clearly appears to have been so intended when executed. *Tedens v. Clark*, 510

MORTGAGES. *Continued.*

8. In the case presented, it is *held*: That the deed in question is a mortgage, and the complainant has a right to redeem therefrom; and that the court below should have ordered an account taken of the amount due. *Id.*, 510

MUNICIPAL CORPORATIONS—See PERSONAL INJURIES, 1; REAL PROPERTY, 1, 2, 3.

1. The re-organization of a city under the general incorporation law abrogates its former charter and determines the tenure of all officers under it, except such as are within the saving clause of the general law. *McGrath v. Chicago*, 19

2. The Act of April 15, 1873, in regard to the levy and collection of taxes by incorporated cities, having been declared unconstitutional, the ordinance of the City of Chicago under which a tax commissioner was appointed, and under which he claims to have performed the duties of such office, and to be entitled to the salary thereof, was void and incapable of conferring any rights upon him. *Id.*, 19

3. In an action against a municipal corporation to recover damages for a personal injury caused by a defective sidewalk, it is *held*: That the evidence tended to support the verdict for plaintiff; that the damages allowed were not excessive; that it was proper to allow the plaintiff to file an amended declaration after the evidence was in; that an objection that there was no issue on the amended declaration was waived by the defendant by proceeding with the trial; that the court properly refused to allow certain questions asked the plaintiff on cross-examination; and that the evidence of the physician who attended the plaintiff, as to the value of his services, was competent. *Chicago v. Wood*, 40

4. Soliciting and taking orders for shirts without a license is not a violation of a city ordinance which prohibits selling, offering for sale, bartering or exchanging any goods, wares, merchandise or other articles of value without a license. *Elgin v. Picard*, 340

5. A city ordinance which is penal in character must be strictly construed. *Id.*, 340

6. In an action against a municipal corporation to recover damages to the premises of the plaintiff alleged to have resulted from the percolation of water from a trench dug in the street for a water pipe and filled up with soft, porous and spongy material without any sufficient outlet for the water accumulating therein, it is *held*: That the plaintiff was not injured by the errors, if any, of the court below in giving instructions or touching the admission of evidence; that the evidence does not sustain the alleged cause of action; that evidence that there was more water in the plaintiff's cellar and premises after than before the completion of the improvement, was but slight proof and was entirely overcome by other evidence. *Dewein v. Peoria*, 396

7. It seems that a municipal corporation is not liable for damages for supposed injuries where it has dug a ditch in a street and filled it with the same soil, although the soil therein is somewhat more porous than before. *Id.*, 396

8. Under an ordinance providing that a gas company shall furnish

MUNICIPAL CORPORATIONS. *Continued.*

the city with gas "of a quality at least equal to, and at rates as favorable as that furnished" by a gas company in a neighboring city, the rates charged can not at any time exceed those then charged by the latter company. *Decatur Gaslight & C. Co. v. Decatur*, 544

9. In an action by a gas company to recover the contract price of gas furnished to a municipal corporation, the question whether the plaintiff is entitled to exclusive privileges, under an ordinance purporting to grant such privileges, does not arise. *Id.*, 544

10. An ordinance of the City of Quincy, declaring the running at large of cattle, horses, mules, goats and sheep within its corporate limits a nuisance, and imposing a fine upon the owner for each violation thereof, is authorized by its charter. *Quincy v. O'Brien*, 591

11. This power is not affected by Chap. 8, R. S., entitled "Animals," although a vote taken under the statute in the county in which Quincy is situated, resulted in favor of stock running at large. *Id.*, 591

12. When a municipal corporation is authorized to impose a fine, and no limit is fixed, the fine imposed may exceed that imposed by the State for the same offense. *Id.*, 591

13. In the absence of an adverse possession, the mere platting of a town gives the public the right to the use of the streets and alleys. *Hatton v. Chatham*, 622

14. Upon appeal from a judgment imposing a fine for a violation of a village ordinance, in relation to obstructions in its streets and alleys, it is *held*: That the village need not resort to an action in ejectment, and that the written notice given was sufficient. *Id.*, 622

15. In an action under a city ordinance to have a fine imposed on the defendant for conducting a soap factory and tallow chandlery in such a manner as to be foul and offensive, it is proper to instruct the jury that the defendant has no right to carry on such a business in a populous city unless it can be done without emitting offensive and noxious odors so as to be detrimental and offensive to the people of its locality. *Winslow v. Bloomington*, 647

16. A municipal corporation may proceed to assess and collect a special assessment based upon an estimate made in conformity with Secs. 20 and 21, Art. 9, Chap. 24, R. S., although such estimate may exceed the actual cost of the proposed improvement. *Bloomington v. Blodgett*, 650

NEGLIGENCE—See CARRIERS, 5; RAILROADS, 3, 4, 5, 6, 8.

NEGOTIABLE INSTRUMENTS—See AGENCY, 3; EVIDENCE, 8, 9, 12, 13.

1. In order to charge the indorser of a promissory note, the holder must use due diligence. *Baer v. Lichten*, 311

2. Where a note is assigned after maturity, to charge the indorser, the assignee must bring suit against the maker at the first term of court unless he can show that such suit would be unavailing or that the maker had absconded when the note was assigned. *Id.*, 311

3. Where the plaintiff in a suit against the indorser relies upon the insolvency of the maker, the burden is upon him to show that such insolvency continued until the commencement of the suit. *Id.*, 311

NEGOTIABLE INSTRUMENTS. *Continued.*

4. In an action on a promissory note brought by a bank against the maker and surety, it is *held*: That the evidence sustains the plea of the surety, alleging an extension of the note by the cashier of the plaintiff without his consent; that the erasure of an indorsement and the failure of the plaintiff to produce its books on notice, required more satisfactory explanation than was given; that a payment of interest to its cashier, although in board, was, under the evidence, a payment to the plaintiff; and that the instructions, though not strictly accurate, could not have misled the jury. *Roseville Union Bank v. Gilbert*, 334

5. In an action upon a promissory note, a plea to the effect that the note was given for seed oats in connection with an agreement that it was not to be paid until the crop matured and the payee had sold a certain quantity of the oats raised, at a stipulated price; that the plaintiff, as assignee, had notice of such agreement, and that such sale has not been made, constitutes a good defense. *Johnson v. First National Bank*, 352

6. In the case presented, it is *held*: That the promise, by the payee, to sell the oats raised, and of the maker to pay the note, are dependent covenants; that the payment of the note depends upon the sale according to agreement; and that certain pleas were defective. *Id.*, 352

7. In an action on a promissory note, the defense being that the note was forged by the plaintiff, it is *held*: That, in view of the special circumstances presented, the court should have allowed great latitude in the cross-examination of the plaintiff as a witness; that it was proper to ask her how often she had written the defendant's name, and whether she had offered to sell the note at a large discount; that evidence tending to impeach the consideration, although not admissible for that purpose under the pleadings, was admissible as tending to show that the defendant did not execute the note; that it was error to allow expert witnesses to compare the signature to the note with certain other signatures of the defendant, and then state their opinions as to the identity of the handwriting; and that there was no error in giving and refusing instructions. *Gitchell v. Ryan*, 372

8. In an action on a promissory note, where the defense is that it was given by the defendant to the plaintiff as a commission merchant in settlement of differences arising under a contract to deal in options on a board of trade for the defendant's account, it is improper to instruct the jury that the plaintiff can recover if he intended at the time of the purchase or sale to receive or deliver the grain bought or sold, the test of the character of the contract being the intention of the parties thereto. *Griswold v. Gregg*, 384

9. In an action upon a promissory note, it is *held*: That the defense that almost, if not quite, the entire consideration for which it was given, was losses incurred by the maker in dealings between the parties in options, is fully sustained by the evidence; that the evidence also shows the illegal intent to have been mutual; that it was unnecessary to show that the parties with whom the plaintiff dealt on the defendant's account knew of the latter's intention not to take the grain and

NEGOTIABLE INSTRUMENTS. *Continued.*

pork bought and sold; that the plaintiff could not recover upon any items of the original indebtedness without surrendering the note for cancellation either before suit or at the trial; that he can not maintain an action on the note and on some of such items at the same time; that the plaintiff was not entitled to open and close the argument on the evidence, the burden of proof being on the defendant; and that there was no substantial error in giving and refusing instructions. *Carroll v. Holmes*, 453

10. A secret illegal intent in one party not known to the other will not invalidate a contract. *Id.*, 453

11. The acceptance of a promissory note is *prima facie* the satisfaction and payment of an open or book account, or antecedent debt, for which it is given. *Id.*, 453

12. A delivery to the payee, actual or constructive, is essential to the validity of a promissory note. *Reynolds v. Moshier*, 471

13. A person receiving a promissory note not payable to himself, without indorsement, takes it subject to all legal and equitable defenses. *Id.*, 471

14. In an action on a note alleged to have been taken for personal property sold at a chattel mortgage sale by an agent, it is *held*: That the evidence almost conclusively shows a want of delivery; and that the court below erred in giving and refusing instructions. *Id.*, 471

15. In an action on a promissory note, where the signature is disputed by the defendant, a witness who has never seen the defendant write, but has merely examined certain signatures admitted to be genuine, is incompetent to testify as to the genuineness of the signature in question. *First National Bank v. Horell*, 594

16. In an action on a promissory note, it is *held*: That the evidence sustains the verdict, and that there was no error in giving and refusing instructions. *Fisher v. Ham*, 601

NUISANCES—See MUNICIPAL CORPORATIONS, 15.

OFFICERS—See MUNICIPAL CORPORATIONS, 1, 2; TROVER, 1.

1. It *seems* that the provisions of paragraph 34, Chap. 24, Starr & C. Ill. Stat., touching the qualifications of Aldermen, are not made applicable to Village Trustees by paragraph 192 of said chapter. *People v. Hamilton*, 609

2. Upon a proceeding by information in the nature of a *quo warranto* to test the right of the defendants to hold the office of Village Trustees, it is *held*: That disqualification arising from being in arrears in the payment of taxes as provided in said paragraph 34, if applicable, applies to the office and not to the election; that payment of the tax by one of the defendants, before assuming the office, removed the objection; and that the other defendant was not in arrears within the meaning of the statute, his arrears being caused by the fault of the collector of taxes. *Id.*, 609

PARTIES—See ADMINISTRATION, 5; CARRIERS, 3; MECHANIC'S LIEN, 2; PRACTICE, 4, 5, 6; STATUTE OF LIMITATIONS.

PARTNERSHIP.

1. Real estate becomes partnership property, as a general rule, when it has been purchased for partnership purposes, appropriated to such purposes and paid for with partnership funds. *Pepper v. Pepper*, 316

2. The legal title of partnership realty is held by the partners as tenants in common, subject in equity to the partnership debts. When the firm debts are paid all the incidents and qualities of real estate revive. It then descends to the heir, and the rents, issues and profits pass to him and not to the administrator. *Id.*, 316

3. In the case presented, it is *held*: That the farm in question was owned by the partners as tenants in common; that upon the death of one of them, the other is not liable to the widow, as administratrix, for rents and profits, and that the doctrine of *res adjudicata* applies with respect to former proceedings for assignment of dower and partition, although the widow now sues as administratrix. *Id.*, 316

4. Upon the formation of a limited partnership to carry on a business already established, the limited partner may pay in money, coupled with a previous or simultaneous agreement that it shall be applied in payment of indebtedness for goods already in stock. Such an agreement is neither against public policy nor contrary to the provisions of the statute of this State. *Anderson v. Stone*, 342

5. In the case presented, this court holds that the affidavit by the general partner, attached to the certificate of partnership, wherein it is stated that the sum paid in by the special partner was actually paid in cash, was true in letter and spirit, although such payment was coupled with an agreement for its application. Such agreement does not render the special partner generally liable for the partnership debts. *Id.*, 342

6. In an action to charge the defendant as surviving partner of her brother, who was indebted to the plaintiff at the time of his death, it is *held*: That as between the defendant and her brother there was no partnership, their minds never having met on that proposition; that a certain agreement, the contents of which were unknown to the defendant, did not constitute them partners; and that the credit in question was not extended on the belief that they were partners. *Butler v. Merrick*, 628

7. Participation in profits and losses is not conclusive of the question whether a partnership exists. *Id.*, 628

PATENTS—See SALES, 1.

PAYMENTS—See BANKS, 1; NEGOTIABLE INSTRUMENTS, 4, 11.

1. Where a creditor makes no application of a payment, part of his indebtedness being secured and part unsecured, such payment may be applied to an unsecured indebtedness at the option of the creditor, or by implication of law. *Scheik v. Trustees of Schools*, 369

PERSONAL INJURIES—See APPEAL AND ERROR, 13; MINES, 1; MUNICIPAL CORPORATIONS, 3; PRACTICE, 8; RAILROADS, 1, 4, 13.

1. In an action against a municipal corporation to recover for a per-

PERSONAL INJURIES. *Continued.*

sonal injury, this court holds that the evidence fails to show a cause of action. *Johnson v. Chicago*, 26

2. In an action against a street railway company to recover damages for a personal injury, it is *held*: That the evidence sustains the verdict for the plaintiff; that the appellant can not, under the bill of exceptions, predicate error upon the ruling of the court in respect to an affidavit for a continuance; and that objection to certain improper remarks of counsel was waived by the failure of defendant's counsel to preserve an exception. *Chicago City Ry. Co. v. Duffin*, 28

3. In an action to recover damages for causing the death of the plaintiff's husband, who was killed by reason of the defective construction of an elevator which he was employed to operate, it is *held*: That a certain conversation with the deceased can not be construed as an agreement on his part to take the risk of defects in the construction of the elevator, or to relieve the defendant from the duty of using reasonable care to provide such appliances for safety as were known and in general use; that it was for the jury to draw from the evidence the inference of care or of negligence; that the declaration was sufficient after verdict and that objection to it should have been taken by demurrer before trial. *Fairbank Canning Co. v. Innis*, 33

4. Upon a rehearing it is further *held*: That in the absence of proof of any other intervening cause, the giving way of the timbers and supports was of itself sufficient evidence to justify a verdict that their construction was negligent; that it was the duty of the defendant to use reasonable care and diligence in supplying, for the use of its employes, machinery which should be reasonably safe and secure; that it was for the jury to determine whether an elevator constructed without a brake was reasonably safe; that the evidence does not show a contract on the part of the deceased to assume any risks beyond those which might result from his own want of care; that there is no evidence tending to charge him with negligence; and that there was no substantial error in giving and refusing instructions. *Id.*, 33

5. In an action against a railroad company to recover damages for a personal injury to the plaintiff, a boy about seven years of age, caused by an engineer of the defendant ordering the plaintiff to get off his engine while in motion, it is *held*: That the evidence being conflicting the verdict of the jury settles the facts; that although the engineer violated his instructions in inviting the plaintiff upon his engine, and although the plaintiff was a trespasser, he had a right to be exempted from the gross carelessness of the defendant's servant in removing him from the engine; that the violation of the rules of the defendant by its servant does not relieve it from liability for his subsequent wrongful acts while endeavoring to obey and enforce said rules; and that his act can not be regarded as wilful and unauthorized. *Chicago, M. & St. P. R. R. Co. v. West*, 44

6. In an action for a personal injury, if the plaintiff needlessly describes the tort and the means by which it is effected with minuteness and particularity, and the proof substantially varies from the statement

PERSONAL INJURIES. *Continued.*

contained in the declaration, the variance will be fatal. *Chicago, B. & Q. R. R. Co. v. Morkenstein*, 128

7. In the case presented it is *held*: That the evidence fails to support the allegations of the declaration; that it shows the plaintiff to have been a trespasser in the yard of the defendant; and that an instruction, submitting to the jury a cause of action substantially variant from that described in the declaration, and a question of wilful tort having no basis in the evidence, was erroneous. *Id.*, 128

8. A laborer upon a construction train and the engineer are fellow-servants. Such laborer can not, therefore, recover from the master for a personal injury caused by the negligence of the engineer where the competency of the latter is not in issue. *Miller v. Ohio & M. Ry. Co.*, 326

PLEADING—See BILLS OF EXCEPTIONS, 1; CARRIERS, 8; NEGOTIABLE INSTRUMENTS, 6; PERSONAL INJURIES, 6, 7; SCHOOLS, 5; VERDICT, 1.

PRACTICE—See ADMINISTRATION, 4, 5, 6; AFFIDAVIT OF CLAIM, 1; APPEAL AND ERROR; CONTRACTORS, 2; JUDGMENTS, 3; MINES, 2; SCHOOLS, 4.

1. By the common or unwritten law of this State, in proceedings before Justices of the Peace, which are notified to begin at a fixed hour, neither party is in default until the expiration of that hour and the commencement of the next. *Brown v. People*, 72

2. Under the general prayer for relief a court of equity may grant the relief appropriate to the facts, although the bill was framed with a view to getting a different relief. *Holden v. Holden*, 106

3. Where there is a prayer for general relief, it is improper to grant a motion, which is in effect a demurrer to the bill, on the ground that the complainant has prayed for wrong relief. *Id.*, 106

4. Where the Supreme Court has disposed of every question between the parties to the record which was presented thereby, and has remanded the cause for further proceedings, the Circuit Court has nothing to do but to enter the decree directed by the Supreme Court. It can not allow an amendment to the bill, which presents no new question as between the parties to the record. *Leiter v. Field*, 123

5. A complainant can not be compelled to add parties to his bill if he chooses to take the responsibility of their not being made parties. *Id.*, 123

6. In the case presented, it is *held*: That the decision of the Supreme Court having settled every question between the parties to the record, the complainant can not amend by making his tenant a party complainant, nor can he require the cross-complainant to make said tenant a party defendant to his cross-bill; and that the injury, if any, to the leasehold estate of the tenant, is distinct from that to the reversionary interest, and constitutes a distinct cause of action. *Id.*, 123

7. The construction of written contracts is a question of law and can not be submitted to the jury. *Harvey v. Cook*, 134

8. In an action against a railroad company to recover damages for

PRACTICE. *Continued.*

causing the death of the plaintiff's intestate, it is *held*: That the defendant can not object to the admission of incompetent testimony called out by its own cross-examination of a witness for the plaintiff; that an objectionable answer could not have any greater weight with the jury because not ruled out until a later stage of the trial; that plaintiff's counsel did not exceed the limits of strict professional conduct in again offering evidence deemed competent by him, although declared incompetent by this court on a former appeal; that it is not indispensable to a right of recovery that the question of comparative negligence be submitted to the jury by the plaintiff; that, in a proper case, either party may ask the court to submit said question; that there was no error in giving and modifying instructions; that, if the defendant desired to raise the questions whether the plaintiff's intestate and the servants of appellant were fellow-servants, and whether the deceased came to his death through one of the ordinary perils of his service, it should have submitted them to the jury by proper instructions; and that they can not be raised here for the first time. *Chicago & A. R. R. Co. v. Fietsam*, 210

9. Where the plaintiff's evidence, with all proper inferences of fact to be drawn therefrom, is insufficient to support a verdict for him, the court may properly direct a verdict for the defendant. *Miller v. Ohio & M. Ry. Co.*, 326

10. In proper cases the court may allow amendments and proceedings in a cause to be filed *nunc pro tunc*. But this should never be allowed when it would work injustice. *Littlefield v. Schmoldt*, 624

11. Where a trial has been had upon a petition for a mechanic's lien, it is improper to allow amendments and to enter a degree *nunc pro tunc*, without notice to the defendant. Where this has been done, the fact that injustice may have been done the defendant is sufficient ground for reversal. *Id.*, 624

12. Upon a second appeal this court declines to reconsider the questions passed upon when the case was here before. *Gardiner v. Bunn*, 627

PRESUMPTIONS—See ADMINISTRATION, 3.

PRINCIPAL AND SURETY—See AGENCY, 5; EVIDENCE, 3; NEGOTIABLE INSTRUMENTS, 4.

QUO WARRANTO.

1. In a proceeding by *quo warranto*, the issue of a writ does not end the discretion of the court. Where the writ has been improvidently issued the court may decline to proceed or to grant the relief sought. *People v. Hamilton*, 609

RAILROADS—See CARRIERS; PRACTICE, 8; PERSONAL INJURIES, 5; STATUTE OF LIMITATIONS, 1, 2.

1. In an action against a railroad company to recover damages caused by a collision at a highway crossing, it is *held*: That witnesses for the plaintiff were properly permitted to testify that they could have

RAILROADS. *Continued.*

heard the bell or whistle if rung or sounded; that it does not appear from the record that the action of counsel for plaintiff in commenting on former verdicts was improper; that there was no error in giving and refusing instructions; that the jury were justified in finding that the place of the injury was on a public highway, and that a failure to give the required signal was statutory negligence; that the questions of fact as to the negligence or comparative negligence of the parties were properly submitted to the jury; and that the findings on said questions is supported by the evidence. *Chicago & A. R. R. Co. v. Dillon*, 204

2. The application of Sec. 68, Chap. 114, R. S., requiring signals at public highways, is not limited to the roads defined to be public highways in Sec. 1, Chap. 121, R. S. *Id.*, 204

3. In an action against a railroad company to recover the penalty for its failure to give the statutory signals at a public highway crossing, it is *held*: That the evidence justified the jury in finding that the crossing in question was a highway crossing and outside of any municipality; that it is immaterial whether the party for whose use the action is brought was guilty of contributory negligence when struck by defendant's locomotive at said crossing, the penalty being forfeited to the State; and that, the evidence being conflicting, the finding of the jury that the required signals were not given, is conclusive. *Mobile & O. R. R. Co. v. People*, 250

4. In an action against a railroad company by an administrator to recover damages for causing the death of the plaintiff's intestate, while a passenger on one of the defendant's trains, it is *held*: That it was negligence on the part of the engineer to give false signals which induced the deceased to jump in the way of a snow plow on another track, there being no danger of a collision; that the deceased was not guilty of contributory negligence in going upon the platform; that the proximate cause of his death was the negligence of the engineer; that there was no variance between the plaintiff's evidence and the declaration; and that there was no error in giving and refusing instructions. *Chicago, R. I. & P. R. R. Co. v. Felton*, 376

5. The officers of a railroad undertake to have knowledge of all facts of which the diligence of good railroad men could have possessed them. *Id.*, 376

6. Where an employe who has control over other servants of the same master, with power to hire and discharge them, gives a negligent order to one of such servants, who, in obeying, causes injury to another of them, the master is liable for the damages. *Chicago, B. & Q. R. R. Co. v. Blank*, 438

7. An instruction which is not based on the evidence or which raises an irrelevant issue, should not be given. *Id.*, 438

8. In an action against a railroad company to recover damages for causing the death of an employe while engaged on a gravel train, it is *held*: That the negligence of the conductor is sufficiently stated in the declaration, it being sufficient to aver negligence in general terms; that the evidence sustains the charge of negligence contained in the declara-

RAILROADS. *Continued.*

tion; that the evidence does not show negligence on the part of the engineer; that there was no error in modifying certain of the defendant's instructions; and that the allowance of \$2,150 as damages was not excessive. *Id.*, 438

9. Railroad companies are required to keep their offices open for the sale of tickets to passengers for a reasonable time before the departure of each train and up to the published time for its departure, but not up to the time of actual departure. *Chicago, R. I. & P. R. R. Co. v. Brisbane*, 463

10. If convenient and reasonable opportunity to purchase tickets is afforded the public, extra fare may be charged such as do not avail themselves thereof. A passenger refusing to pay the extra fare under such circumstances may be ejected from the train. *Id.*, 463

11. A demand for fare by the conductor of a passenger train must be obeyed or the passenger must, at the conductor's request, leave the train in a peaceable manner. If he refuses so to do, he can not recover damages for the use of necessary force in ejecting him from the train, unless the expulsion was malicious or wanton. *Id.*, 463

12. In the case presented, it is *held*: That certain instructions given for the plaintiff were improper; that the instruction touching the assessment of punitive damages was erroneous because not based on the evidence; that an instruction to the effect that the plaintiff might recover for the feelings of shame and humiliation which he endured in consequence of being put off and expelled from a public conveyance, was erroneous; that the court erred in refusing certain instructions; that the plaintiff was not entitled to recover the remote damages caused by his walk of several miles to another station, when he might have returned a short distance to the station from whence he started; and that it does not appear that the conduct of the conductor was wanton or malicious. *Id.*, 463

13. In an action against a railroad company to recover for injuries alleged to have been caused by the negligence of a conductor in assisting the plaintiff to alight from a train, it is *held*: That the evidence does not sustain the verdict for the plaintiff; and that evidence of the value of services of her daughters, who made no charge for such services, was improperly admitted. *Chicago, B. & Q. R. R. Co. v. Johnson*, 468

14. A railroad company is liable for killing an animal, although it was unlawfully at large and upon the defendant's track, if, by the exercise of proper care and prudence after the discovery of the animal, its engineer might have prevented the injury. *Chicago & A. R. R. Co. v. Hill*, 619

15. It is the duty of railroads to use every possible precaution to prevent loss to others through the escape of fire or sparks from their engines, by the highest degree of diligence in ascertaining and adopting the best or most approved mechanical inventions and appliances to prevent the escape of fire. *Chicago & A. R. R. Co. v. Hunt*, 645

16. In an action against a railroad company to recover damages for the alleged burning of a building by sparks emitted from the defend-

RAILROADS. *Continued.*

ant's locomotive, it is improper to instruct the jury that it was the duty of the defendant to use "all the best and most approved mechanical inventions" to prevent loss from the escape of fire or sparks from its locomotive. *Id.*, 645

17. In an action against a railroad company to recover the statutory penalty for running a train through a city faster than prescribed by the city ordinance, it is *held*: That it is immaterial whether a signal was given as the train approached a certain crossing; that one who can show that his injury is the proximate result of the unlawful rate of speed, whether he came in contact with the train or not, is a "person aggrieved," within the meaning of Sec. 87, Chap. 114, R. S.; that he may recover the penalty regardless of his right to maintain an action for damages; and that an objection to the ordinance should have been specifically stated when it was offered in evidence. *Chicago & E. I. R. R. Co. v. People*, 562

REAL PROPERTY—See PARTNERSHIP, 1, 2, 3; JURISDICTION, 2, 3, 4.

1. The purchaser of a lot is bound by the description contained in his deed, and is estopped from claiming more land than is therein described, or the plat as recorded showed to be free from an adjoining street, or that he knew or by reasonable inquiry might have known was not in the street. *Mann v. Elgin*, 419

2. Where a street or highway is dedicated by an individual to the public, and it appears beneficial and necessary to the public, acceptance will be presumed from slight circumstances. *Id.*, 419

3. In the case presented, the evidence shows that the defendant knew that one-half of a certain street was on the lot purchased by him. *Id.*, 419

RECEIPT—See BONDS, 1.

RECOGNIZANCE—See SCIRE FACIAS, 1, 2, 3, 4.

REMOVAL OF CAUSES.

1. A bill of review filed in the Circuit Court to annul a former decree, granting a divorce by that court for fraud, is not removable to the Circuit Court of the United States, although the defendant resides in another State. *Caswell v. Caswell*, 548

REPLEVIN.

1. In an action of réplevin to recover the possession of a piano held by the defendant under an execution against a third person, it is *held*: That evidence touching the validity of a certain chattel mortgage on the piano was properly excluded, the genuineness of said mortgage not being in issue; that the verdict is not so manifestly against the weight of evidence as to require a reversal; and that there was no error in the instruction. *Smith v. Mohler*, 407

2. In an action of replevin to reclaim goods sold to the defendant by his son, who, it is claimed, had purchased them of the plaintiffs, "with the pre-conceived intention not to pay," and of which intention the defendant is alleged to have had knowledge, it is *held*: That certain

REPLEVIN. *Continued.*

depositions, taken in cases in which the defendant was not a party, to prove fraudulent representations by the son to third persons, were improperly admitted by the court below; that the report of the son's financial condition, made by an agent to a mercantile agency, was also improperly admitted; that the evidence does not support the finding that the defendant, when he purchased, knew that his son purchased the goods in question with a pre-conceived intention not to pay for them; and that their relations as father and son and creditor and debtor, and certain other circumstances relied on, are insufficient to charge the defendant with knowledge of any fraudulent intention on the part of his son. *Brown v. Bierman*, 574

3. In an action of replevin to recover goods sold to the son of the defendant prior to the transfer, by the son to the father, of the stock of goods in payment of a large indebtedness, it is *held*: That the evidence sustains the verdict for the defendant; that it does not appear that the defendant had knowledge of any fraudulent or false representations made to the plaintiffs by his son; that knowledge that his son was in embarrassed circumstances would not put him on inquiry as to whether he had committed fraud; and that there is no substantial error in giving and refusing instructions. *King v. Brown*, 579

SALES—See REPLEVIN, 2, 3.

1. The warranty in a contract, guaranteeing the exclusive sale of a machine within a certain territory, is not broken by the sale within said territory of a different machine manufactured by a third party under the same patent. *Kingman & Co. v. Martin*, 435

2. To warrant the rescission of a sale the vendor must show actual fraud, consisting in a positive intention of the vendee, at the time of the purchase, not to pay, or in false representations as to his ability to pay. *King v. Brown*, 579

3. Known insolvency is not sufficient proof of an intention not to pay for goods purchased. *Id.*, 579

SCHOOLS—See BONDS, 1.

1. School Directors have no power to employ a teacher just before the expiration of the school year for a term extending three months into the ensuing year. *Cross v. School Directors*, 191

2. In the case presented, it is *held*: That the plaintiff can not recover under his first contract, which was abandoned by mutual consent; that his discharge was not wrongful; and that he can not recover for the time taught, the cause of action set out being the wrongful discharge. *Id.*, 191

3. Action against municipal corporation to recover "one-half of all money received into the city treasury from dram shop licenses" as provided by the defendant's charter. *East St. Louis v. Trustees of Schools*, 194

4. In an action by a teacher upon an alleged special contract to teach for one month after the expiration of her regular term, it is *held*: That the evidence sustains the verdict of the jury for defendant; and that

SCHOOLS. *Continued.*

there was no error in permitting the jury to pass upon the evidence and return a verdict without leaving the court room, after a refusal of the court to pass upon a demurrer to the plaintiff's evidence. *Stewart v. School Directors*, 229

5. The power to determine the validity and sufficiency of the required security for school funds loaned, is vested by Sec. 57, Chap. 122, R. S., in the township treasurer. *Board of Trustees v. Baker*, 231

6. In an action on the official bond of a township treasurer, the breach assigned being the failure of the principal to take sufficient mortgage security for school funds loaned by him, it is *held*: That a plea to the effect that the loan was made upon said security at the request of the Directors constitutes no defense; and that the district is not estopped by the unauthorized acts of its officers. *Id.*, 231

SCIRE FACIAS.

1. In order to maintain a proceeding by *scire facias* for final judgment upon a recognizance, a regular judgment of forfeiture, rendered prior to the commencement of such proceeding, must be shown. *Brown v. People*, 72

2. It is indispensable to a legal default and declaration of forfeiture of a recognizance, that the principal should have been regularly called, and upon such call failed to appear. *Id.*, 72

3. In the case presented, it is *held*: That the evidence failed to show that either the principal or surety was called by the Justice; and that the principal had all the time between the hour set and the commencement of the next in which to appear. *Id.*, 72

4. It *seems* that, as in preliminary examinations a Justice of the Peace is an officer of general powers, jurisdictional facts need not be shown in a proceeding by *scire facias* for final judgment upon a recognizance. *Id.*, 72

SEPARATE MAINTENANCE.

1. Upon appeal from a decree allowing separate maintenance, it is *held*: That the finding of the court below, that the wife was living separate and apart from the defendant without her fault, is sustained by the evidence, which was conflicting; and that the allowance for alimony and solicitor's fees, although "full liberal," was not, in view of all the circumstances, so excessive as to require a reversal. *Johnson v. Johnson*, 80

SET-OFF—See ADMINISTRATION, 2.

1. The fifth exception, specified in Sec. 60, Chap. 77, R. S., allowing an attorney's claim for fees for services rendered and disbursements in procuring a judgment priority over the set-off of a judgment in favor of the judgment debtor against his client, is general and not limited in its application to fees and disbursements for which he has a lien at law or in equity. *Brent v. Brent*, 448

SHERIFF.

1. Although the original possession of goods by a Sheriff may have

SHERIFF. *Continued.*

been defective, third parties can not complain if such possession was perfected by a legal and complete levy before their rights attached.

Gardiner v. Bunn,

627

SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS, 16.

STATUTES.

1. Where two acts can stand together, the doctrine of repeal by implication has no application. *Neatherly v. People,*

273

2. In the construction of a statute, effect will be given, if possible, to every word and sentence contained therein. *Root v. Sinnock,*

537

3. The repeal of a statute by implication is not favored and will not be easily presumed. *Quincy v. O'Brien,*

591

4. Where a proceeding under a statute is defective in some particular which the Legislature might have dispensed with, it may be dispensed with by a subsequent act operating retrospectively. *Doyle v. Baughman,*

614

STATUTE OF FRAUDS.

1. A parol agreement for a right to flow water through a ditch on another's land is void, such right being an interest in lands within the Statute of Frauds. *Deyo v. Ferris,*

416

STATUTE OF LIMITATIONS—See ADMINISTRATION, 2; MORTGAGES, 1, 2.

1. Where suit is brought against A by the name of B, and he appears and defends, and pending the suit the mistake in the name of the defendant is discovered and corrected by inserting in the record his proper name, such amendment does not constitute the bringing of a new suit against A. This rule applies where the defendant is a corporation. *Pennsylvania Co. v. Sloan,*

48

2. In an action to recover damages for a personal injury, brought against the "Pittsburg, Ft. Wayne & Chicago Railroad Company," instead of the "Pennsylvania Company," by the negligence of whose servants the plaintiff was injured, it is *held*: That the Pennsylvania Company was the real defendant in the original summons; that the evidence was sufficient to warrant the jury in finding that the plaintiff, in suing out the original summons, intended to bring suit and in fact brought suit against said Pennsylvania Company; that the amendment of the record by inserting the proper name of the defendant was not the commencement of a new suit; and that the action is not, therefore, barred by the Statute of Limitations. *Id*

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TAXES—See SPECIAL ASSESSMENTS.

1. When it clearly appears that there has been an excessive levy, such excess becomes a legal defense, *pro tanto*, which may be interposed before the confirmation of the assessment, or when the collector applies for judgment against the property assessed. *Bloomington v. Blodgett,*

650

2. All proper objections and defenses arising subsequently to the confirmation of an assessment may be set up when the collector seeks judgment. *Id.,*

650

TAXES. *Continued.*

3. A bill in equity does not lie to enjoin the collection of an excessive levy for a special improvement, there being an adequate remedy at law. *Id.*, 650

TORTS—See **LUNATICS**, 1, 2.

TRESPASS—See **ASSAULT AND BATTERY**, 1; **DRAINAGE**, 5.

TRIAL—See **CONTRACTORS**, 2; **PRACTICE**; **SCHOOLS**, 4.

1. A trial court may, in its discretion, require a case to be closed within a particular time. *Winslow v. Bloomington*, 647

TROVER.

1. Where an officer levies on the goods of one person under an execution against another, and sells them, he is liable in an action of trover. Proof of the sale makes out the conversion, no demand being necessary. *Hanchett v. Williams*. 56

TRUSTS—See **ACCOUNTING**, 1; **INSURANCE**, 1; **MISTAKE**, 1,

1. Upon a bill filed by heirs of the owner of certain government bonds, to recover an interest therein, it is *held*: That by a written direction to the bank where the bonds were on deposit for safe keeping, the deceased placed the bonds in trust, first, for himself, during life, next, to his wife, to have the interest during life and then the principal to revert to his heirs; that by an agreement between the widow and one of the heirs, the former recognized the trust created by her husband; that proof of the execution of the original instrument was unnecessary, the execution of the other, to which the first was attached as an exhibit, being proved; and that the custodian of an agreement between two of the heirs was not their agent in any such sense as would make the survivor a competent witness to facts testified to by him, within the meaning of the second exception to Sec. 2, Chap. 51, R. S. *Comer v. Comer*, 526

TRUST DEEDS.

1. Upon a bill to foreclose a trust deed this court affirms the decree of the court below for the complainant, the defense that the notes secured were extended without a reservation of the right to declare the whole principal due for default, not being sustained by the evidence. *Stein v. Abell*, 126

2. Upon a bill filed by the owner of a portion of a tract of land subject to a trust deed, securing a note, a balance on which he had been required to pay, against the owners of other portions for contribution, it is *held*: That the lien of the trust deed was not affected by certain partition proceedings, wherein a certain part of the premises was set apart on account of the debt secured by the trust deed; that the acceptance by the holder of the note of the proceeds of the part so set apart did not extinguish the trust deed; that the sale by the trustee of the complainant's portion of the premises was legal; and that he thereby became entitled to contribution from certain of the defendants. *Brown v. Shurtleff*, 570

ULTRA VIRES—See **INSURANCE**, 9.

USURY—See MORTGAGES, 6.

1. Upon the renewal of a note the parties may contract to give and receive interest on yearly interest already due without rendering the transaction usurious. *Gilmore v. Bissell*, 481

VARIANCE—See MASTER AND SERVANT, 2; PERSONAL INJURIES, 6, 7.

VERDICT.

1. Where the declaration states a cause of action, though ambiguously and improperly, a general verdict will cure the defect therein. *Moline Plow Co. v. Anderson*, 364

WAIVER—See MECHANIC'S LIEN, 1; PERSONAL INJURIES, 2.

WILLS.

1. Real property devised to a daughter, "to hold as long as she lives, without the privilege of selling it to any person, and at her death * * to go to her children, if any," is not subject to sale on execution against her. *Emerson v. Marks*, 642

WITNESSES—See ADMINISTRATION, 2; CONTRACTORS, 2; MUNICIPAL CORPORATIONS, 3; NEGOTIABLE INSTRUMENTS, 7, 15; TRUSTS, 1.

1. Where a witness had no acquaintance with the handwriting of a party until a particular signature, purporting to be his, was disputed, the subsequent examination, by him, of the signature to an answer in chancery and to certain other papers that he heard the party state under oath were signed by him, did not render him competent to testify as to the genuineness of the disputed signature. *First Nat. Bank v. Hotell*, 594

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